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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; El Paso District Court; Honorable David L. Shakes; and Case Number 17CR705	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JESSIE MEDINA JR.	
Megan A. Ring, Colorado State Public Defender JESSICA SOMMER 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #50860	Case Number: 18CA192

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 7,596 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.

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1. Whether the prosecutor committed misconduct and misstated the law when he told the jury that, pursuant to the overdose immunity statute, a person must overdose "in good faith" and that the immunity only extends to the specific drug which reportedly caused the overdose.
2. Whether the trial court erred when it rejected Mr. Medina's tendered instruction containing subsection (2) of the overdose immunity statute, which specifies that the statute's immunity extends to the person who suffered from the overdose.
3. Whether the trial court erred when it concluded that Mr. Medina "opened the door" to testimony that he took pills to prevent the parole officers from finding them when he elicited testimony that he was taken to the hospital for a drug overdose.

STATEMENT OF THE CASE

Jessie Medina, Jr. was convicted by a jury of one count of possession of a schedule II controlled substance pursuant to §18-18-403.5(1),(2)(a), a level four drug felony, for methamphetamine that was found on his body while he was receiving medical treatment for a drug overdose. CF, p 3, 296. He was sentenced

to eighteen months in the Department of Corrections, consecutive to a parole sentence he was already serving. CF, p 296.

STATEMENT OF THE FACTS

In December 2016, Mr. Medina was on parole for prior offenses. CF, p 3, 296. As part of his parole supervision, he wore a GPS ankle monitor which tracked his location. TR 8/28/2017, p 118:13-20. Early in the morning on December 19, parole officers received an alert that Mr. Medina's ankle monitor had a low battery. *Id.* at 100:13-22. As a result, two officers, Officer Rohar and Officer Bensko, went to Mr. Medina's residence of record at a motel. *Id.* at 100:18-101:1. They attempted to enter the room with a key card, but the door was latched from the inside. *Id.* at 101:11-19. The officers knocked on the door, and after a few minutes, Mr. Medina answered. *Id.* at 101:20-102:2.

As soon as Mr. Medina answered the door, the officers put him in handcuffs and began searching the room. *Id.* at 126:6-9. They found a bottle of alcohol and several syringes, one of which appeared used. *Id.* at 102:10-19; 126:10-16; EX 1.

During the search, Mr. Medina told the officers that he had swallowed a large number of pills. *Id.* at 138:1-4; TR 8/29/2017, p 36:17-19; 48:1-7. Exactly what was said in this exchange was disputed at trial. Officer Rohar testified that Mr. Medina reported that he took seventeen Adderall pills, and that he stated he

"did it to prevent [the officers] from finding them." *Id.* at 48:2-25. These statements were initially suppressed because they were obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). CF, p 106-111. However, they were admitted at trial after the court concluded that Mr. Medina "opened the door" by asking Officer Bensko whether he took Mr. Medina to the hospital because of an overdose. TR 8/28/2017, p 137:12-139:4.

In contrast, Mr. Medina testified that he told the officers he had "ingested a large amount of pills" and that he repeatedly asked to be taken to the hospital. He denied saying that he took the pills to prevent the officers from finding them or that he specified taking Adderall. TR 8/29/2017, p 35:20-36:21.

Regardless of the specific statements, after learning that Mr. Medina had taken a large number of pills, the officers transported him to the hospital for a potential overdose. TR 8/28/2017, p 132:1-3; 133:5-9.

At the hospital, Mr. Medina started shaking and shivering, and "[l]ooked like he was taking a turn for the worse." *Id.* at 143:14-18. He was in a "life or death situation" when hospital staff began performing "aggressive care" and had to cut off Mr. Medina's clothing. *Id.* at 157:1-11; 163:2-4. As Mr. Medina was being transferred from one bed to another, a small plastic bag fell from the area of his buttocks. *Id.* at 143:22-144:3; 157:8-15; EX 2, 3. The bag contained a needle cap

and a crystallized substance. *Id.* at 157:17-19. A CBI analyst identified the substance as 2.12 grams of methamphetamine. TR 8/29/2017, p 12:6-8.

As a result of the overdose, Mr. Medina was hospitalized for several days, after which he was immediately transported to jail. *Id.* at 30:21-23.

Mr. Medina appeared pro se at trial and presented a different version of the events leading up to the overdose. He testified that before the officers arrived at his motel room, he was suicidal and had taken a combination of barbiturates, Adderall, and amphetamine pills in an effort to take his own life. *Id.* at 30:5-12. He passed out after taking the pills but was awoken by the officers knocking. *Id.* at 30:13-14. He testified that when he woke up, he realized he did not want to die and asked the officers for medical attention. *Id.* at 30:16-20.

At trial, Mr. Medina denied knowingly possessing the methamphetamine found at the hospital—he maintained he had taken all the drugs he had in the effort to kill himself. *Id.* at 31:10-15; 37:21-38:9. He implied that the prosecution was the result of bias from the parole officers, with whom he had an acrimonious relationship. *Id.* at 77:22-78:9. To support this theory, he testified that he had previously complained to Officer Rohar that his ankle monitor was malfunctioning, but he "didn't care really." *Id.* at 29:6-12. He also elicited that, on one occasion, one of the testifying parole officers kicked in his door and searched his apartment

in response to similar low battery alert from this ankle monitor. TR 8/28/2017, p 172:8-11; TR 8/29/2017, p 29:12-22.

In addition to this theory, Mr. Medina raised the affirmative defense of overdose immunity under §18-1-711, C.R.S., which provides immunity from prosecution or arrest for certain offenses when a person reports an emergency drug overdose. CF, p 134; TR 8/28/2017, p 98:12-14; TR 8/29/2017, p 77:23-78:3.

SUMMARY OF THE ARGUMENT

1. The prosecutor committed misconduct when he misstated the law on the affirmative defense of overdose immunity. During closing argument, the prosecutor argued that he had disproven the affirmative defense beyond a reasonable doubt because Mr. Medina did not demonstrate good faith when he took the drugs in order to hide them from the parole officers. But the plain language of the statute does not require the *overdose* to have been in good faith; rather, the *report* must have been in good faith. The statute simply does not inquire into the reason for the overdose, nor would it make sense to do so, as most overdoses on controlled substances are inherently caused by unlawful conduct—the use of a controlled substance. Thus, the prosecutor's argument that Mr. Medina was not entitled to immunity because he did not overdose in good faith misstated the law.

The prosecutor further misconstrued the overdose immunity statute when he argued that the possession of methamphetamine charge did not arise out of the same course of events as the overdose, as required under the statute, because Mr. Medina reported taking Adderall, not methamphetamine. However, nothing in the statute requires the overdose to have been caused by the specific drug reported. The statute requires the overdose and the charge to be connected by the same "course of events," not the type of drug ingested or reported.

Reversal is required under plain error because the prosecution's only arguments that it disproved the affirmative defense were based on these misstatements of law. And without these misstatements, the evidence supported the affirmative defense, as Mr. Medina honestly reported that he had taken too many pills and needed medical assistance, he cooperated with law enforcement, and the methamphetamine was found while Mr. Medina was being treated for a drug overdose. Thus, without these misleading statements of law, the jury would have likely acquitted Mr. Medina based on the affirmative defense.

2. The trial court erroneously rejected Mr. Medina's tendered instruction which encompassed subsection (2) of the overdose immunity statute and informed

the jury that the statute's immunity extends to cover the person who overdosed. The jury was only instructed with the requirements for immunity found in subsection (1) of the statute, but these conditions are written from the prospective of a third party reporter. They require the person reporting the overdose to remain on the scene and cooperate with law enforcement—actions that are not typically within the control of a person suffering from an emergency drug overdose. Thus, because the jury could have interpreted this instruction to not apply to persons who suffered from the overdose, the instructions did not adequately inform the jury of the law. This misunderstanding would have led the jury to improperly deny Mr. Medina the affirmative defense even if the prosecution had not disproven every element beyond a reasonable doubt. Thus, the failure to give this instruction violated Mr. Medina's due process rights, and reversal is required.

3. The trial court erroneously concluded that Mr. Medina opened the door to his previously suppressed statements that he took the Adderall to hide it from the parole officers when he elicited that he went to the hospital for an overdose. This question did not open the door to Mr. Medina's reasons for taking the Adderall, as nothing about the fact that he went to the hospital for an overdose was misleading, created an adverse inference, or revealed only

one side of the story. This was a true and complete statement about why he went to the hospital. The reason he took the Adderall is a separate, unrelated issue. Reversal is required as this evidence was heavily emphasized by the prosecution in closing argument, and it was the sole evidence it used to disprove the good faith element of the affirmative defense. Moreover, this evidence undercut Mr. Medina's general denial claim, and it supported the prosecution's theory that he put the methamphetamine in his underwear to hide it from the parole officers. Accordingly, reversal is required.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW ON THE AFFIRMATIVE DEFENSE OF OVERDOSE IMMUNITY, VIOLATING MR. MEDINA'S RIGHT TO A FAIR TRIAL.

A. Standard of Review and Preservation

Where, as here, Mr. Medina did not object at trial, this court reviews whether a prosecutor committed misconduct for plain error. *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010). Plain error review, however, "does not excuse the appellate court from its responsibility to address errors that prejudice the defendant." *Id.* "Ensuring fundamental fairness in trial is the beacon of plain error review." *Id.* at 1098.

B. Discussion

"[A] prosecutor, while free to strike hard blows, is not at liberty to strike foul ones." *Domingo-Gomez v. People*, 125 P.3d. 1043, 1048 (Colo. 2005). "It is improper for counsel to misstate or misinterpret the law during closing argument." *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999); *accord People v. Rodriguez*, 794 P.2d 965, 977 (Colo. 1990). Misleading a jury with this type of improper argument may violate the defendant's constitutional right to a fair trial. U.S. Const. amend. V, VI, XIV; Colo. Const. art. II § 16, 25; *Domingo-Gomez*, 125 P.3d. at 1048.

Mr. Medina's primary theory of defense was that he is immune from prosecution for possession of a controlled substance under the emergency drug overdose immunity statute, and the jury was instructed with this affirmative defense. CF, p 134.

Pursuant to this statute, a person who suffers an emergency drug overdose event is immune from criminal prosecution if:

(a) The person reports in good faith an emergency drug or alcohol overdose event to a law enforcement officer, or the 911 system, or to a medical provider;

(b) The person remains at the scene of the event until a law enforcement officer or an emergency medical responder arrives or the person remains at the facilities of the medical provider until a law enforcement officer arrives;

(c) The person identifies himself or herself to, and cooperates with, the law enforcement officer, emergency medical responder, or medical provider; and

(d) The offense arises from the same course of events from which the emergency drug or alcohol overdose event arose.

§18-1-711(1).

1. The prosecutor misstated the law by implying that the overdose must have been in good faith.

During closing argument, the prosecutor asserted that he had disproven condition (a) beyond a reasonable doubt. He argued:

> [Mr. Medina] told the officer that he took the drugs to keep them from finding it. It's very that's – that's excuse me. It's that simple. Right? Both parole officers testified that he said he took the pills. And when asked why he said he took them so you wouldn't find them. Is that good faith?
>
> …
>
> Was it reported in good faith? Well, no. *When you take something to hide evidence, that's not good faith.*

TR 8/29/2017, p 73:8-25 (emphasis added).

This is not a correct statement of the law. By arguing that taking drugs to hide them is not "good faith," and therefore disqualifies the person who took the drugs from immunity, the prosecutor implied that the overdose must have occurred in good faith to qualify for statutory immunity. But the text of the statute requires that a person "*report[] in good faith* an emergency drug or alcohol overdose

event." §18-1-711(1)(a) (emphasis added). According to this plain language, the report is the only thing that must be "in good faith," as the "good faith" modifier does not apply to the overdose. Contrary to the prosecutor's argument, the statute simply does not refer to a "good faith" overdose.

And whether the report was in good faith is unrelated to the reason the drugs were consumed. To report in good faith, the reporter must simply have had a genuine belief that an overdose event was in progress, regardless of what led to that event. *Cf. Credit Serv. Co., Inc. v. Dauwe*, 134 P.3d 444, 447 (Colo. App. 2005) (report of child abuse is not in good faith if the report was made to harm someone and there was no factual basis underpinning the report); BLACK'S LAW DICTIONARY 808 (10th ed. 2014) (defining "good faith" as "honesty in belief or purpose").

No part of the statute expresses a concern for the reason behind the overdose event. For example, subsection (5) defines an emergency overdose event as any "acute condition…resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance was combined that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance." §18-1-711(5). This definition contains no limitation on or inquiry into why a person consumed the substance.

And the prosecution's interpretation of the statute is illogical. In most circumstances, a person who overdoses on a controlled substance has engaged in unlawful behavior. To distinguish between a "good faith" overdose and a "bad faith" overdose, when in both cases the underlying act is unlawful, does not make sense. *See Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) ("A statutory interpretation leading to an illogical or absurd result will not be followed.").

Nor does this interpretation promote the purpose of the statute. The statute was designed to encourage prompt reporting of overdoses to prevent deaths that result from the use of alcohol or drugs. CF, p 32 (quoting the legislative declaration for Senate Bill 12-020). Limiting immunity to drug users who overdose for some reasons but not others would undermine the statute's purpose to encourage reporting in all cases to prevent deaths. *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006) (courts must interpret statutes to "effectuate the General Assembly's intent," and "[o]ften the best guide to legislative intent is the context in which the statutory provisions appear and any accompanying statement of legislative policy").

Thus, the prosecutor's argument that Mr. Medina did not overdose in good faith misinterprets the law. By misstating the law during closing argument, the

prosecutor committed misconduct and violated Mr. Medina's right to a fair trial. *Anderson*, 991 P.2d at 321; *Domingo-Gomez*, 125 P.3d at 1048.

2. The prosecutor misstated the law by arguing that immunity only extends to the specific drug which reportedly caused the overdose.

The prosecutor also told the jury that he had disproven condition (d) beyond a reasonable doubt because Mr. Medina reported he overdosed on Adderall, but he was only charged for methamphetamine found at the hospital:

> The defendant is not charged with possession of Adderall. The defendant is not charged with the consumption of Adderall. The defendant is not charged with drug paraphernalia. The only thing the defendant is charged with is possession of methamphetamine that was located in his underwear, around his backside, after he had been laying in the hospital bed.
>
> …
>
> He's not been charged with Adderall. He's not been charged with possession or use of Adderall. He has been charged with something entirely different that was located on his person later. You did not here [sic] a single officer tell you that the moment he walked in the door, "Hey, I have a bunch of meth on me. I took a bunch myself. I took all that I had. Please help me." Well, if he would have said that, we wouldn't be here. None of officers told you that. They did say that he admitted to taking one thing. Adderall.

TR 8/29/2017, p 73:18-74:19.

Again, this argument misinterprets the law. Condition (d) requires that "[t]he offense arises from the same course of events from which the emergency

drug or alcohol overdose event arose." §18-1-711(1)(d). However, it does not limit immunity for possession of a controlled substance to the specific substance reported in the overdose, as the prosecutor argued.

This choice is made clear in subsection (3) of the statute. Pursuant to this subsection, the statute's immunity applies to the offense of unlawful possession of a controlled substance in general. §18-1-711(3)(a). There is no limitation or qualification requiring the possession charge to be related to the drug reportedly consumed.

Under the prosecutor's interpretation of the statute, a person overdosing must confess to all controlled substances in his or her possession as part of the report in order to qualify for immunity. But this reading is not supported by the plain language of the statute. The statute simply requires a report of an overdose event—it does not require the reporter to name, or even know, the substance causing the overdose event.[1]

Had the legislature intended to limit the immunity to the specific drug reported, "it would have said so directly." *People v. Griffin*, 397 P.3d 1086, 1089 (Colo. App. 2011). But instead, the statute broadly refers to "the same course of

[1] The prosecutor's argument relied on the parole officers' testimony that Mr. Medina reported taking Adderall. However, Mr. Medina testified that he told the officers he had "ingested a whole bunch of pills," but he did not specifically report what drugs he had taken. TR 8/29/2017, p 36:17-19.

events." Nothing in the statute supports the prosecutor's narrow reading of this phrase.

Thus, the prosecutor's argument that Mr. Medina does not qualify for immunity because he reported Adderall use, but methamphetamine was found, misinterprets the law. And by misstating the law during closing argument, the prosecutor committed misconduct and violated Mr. Medina's right to a fair trial. *Anderson*, 991 P.2d at 321; *Domingo-Gomez*, 125 P.3d at 1048.

C. The error was plain, and reversal is required.

Because these improper arguments were "obvious" and "so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction," reversal is required. *Wilson v. People*, 743 P.2d 415, 419-20 (Colo. 1987).

These arguments were obviously improper because they contravened the plain language of the statute. *People v. Kadell*, 2017 COA 124, ¶¶ 26-27 (error in statutory interpretation was obvious despite lack of explanatory case law where the court's analysis relied entirely on the statute's plain language); *People v. Heywood*, 2014 COA 99, ¶ 36 (although statute had never been previously interpreted, error was obvious because the relevant terms had common and ordinary meanings and

the statute was unambiguous); *People v. Pollard*, 2013 COA 31M, ¶ 40 (error is obvious where it contravenes "a clear statutory command").

And these comments cast serious doubt on the reliability of Mr. Medina's conviction. Mr. Medina's primary defense was that he was immune from prosecution for possession of the methamphetamine under this statute. CF, p 134 As an affirmative defense, the prosecution had the burden of disproving every element beyond a reasonable doubt. *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005); §18-1-407(2), C.R.S.

But the prosecutor told the jury that it had met this burden by misstating the law. Indeed, the prosecutor's entire theory for disproving the affirmative defense was based on these misinterpretations of the law—he made no other arguments to disprove any element of the affirmative defense. This was not a single, isolated misstatement, since it encompassed the prosecutor's entire response on the elements of the affirmative defense. *Compare People v. McBride*, 228 P.3d 216, 225-26 (Colo. App. 2009) (pervasive prosecutorial misconduct required reversal under plain error) *with People v. Beilke*, 232 P.3d 146, 155 (Colo. App. 2009) (single, isolated misstatement of law was not plain error).

Had the prosecutor not made these misstatements, the jury would have likely concluded that the prosecution had not disproved the affirmative defense beyond a

reasonable doubt. Regarding condition (a), it was undisputed that an overdose event occurred—Mr. Medina took a large number of pills and suffered a severe medical illness as a result. *See* TR 8/28/2017, p 133:7-9; 143:14-18; 157:1-11; 163:2-4. And when he told the parole officer that he had taken these pills and needed to go to the hospital, he reported the overdose in good faith.[2] *Id.* at 133:7-9; TR 8/29/2017, p 35:20-23; 48:2-3.

As to conditions (b) and (c), the prosecution did not dispute that Mr. Medina cooperated with law enforcement and medical staff and remained on the scene. *See* TR 8/29/2017, p 73:13-14 ("He then remained at the scene which he did. He identified himself and cooperated, largely cooperated.").

And for condition (d), the evidence established that the charge arose "from the same course of events" as the overdose because, while he was receiving medical treatment for the overdose, hospital staff discovered the methamphetamine. TR 8/28/2017, p 143:22-144:3; 157:8-15; EX 2, 3. The discovery of the methamphetamine thus stems from the same course of the events as the overdose.

[2] Although Mr. Medina testified that he asked to be taken to the hospital, neither officer recalled this statement. *See* TR 8/28/2017, p 139:13-23; TR 8/29/2017, p 35:20-23; 49:10-19. However, even assuming Mr. Medina did not specifically ask to go to the hospital, the logical inference from the statement that he had taken a lot of pills is that he wanted medical attention. He had no other reason to admit to taking the pills.

The prosecutor even seemed to admit as much when he argued that had Mr. Medina reported he overdosed on the methamphetamine, "we wouldn't be here." *Id.* at 74:17-18. But had Mr. Medina reported that he was overdosing on methamphetamine, not Adderall, he would have still gone to the hospital and underwent the same medical procedures that led to the discovery of the methamphetamine in his possession. Nothing about the actual "course of events" would have changed.

The jury could have reasonably acquitted Mr. Medina based on the affirmative defense even though, in his testimony, he denied knowingly possessing the methamphetamine. There is no inconsistency between his assertion that he did not know anything about the methamphetamine and the fact that, regardless of his knowledge, he should have been immune from prosecution under the overdose immunity statute. *See People v. Wakefield*, 2018 COA 37, ¶ 27 (defendant can pursue two different theories of defense where neither theory "depend[s] on rejection of defendant's version of events in sworn testimony"); *see also Brown v. People*, 239 P.3d 764, 767-69 (Colo. 2010) (defendant who maintains his innocence is still entitled to a lesser included offense instruction where there is no inconsistency between the lesser offense and the defendant's sworn testimony).

Thus, without these misstatements of law, the jury would have likely concluded that the prosecution had failed to disprove the affirmative defense beyond a reasonable doubt, resulting in an acquittal. Accordingly, the error was plain and reversal is required. *See People v. Fortson*, 2018 COA 46M, ¶ 90 (where evidence was insufficient to conclude that the jury could have only found the defendant guilty, prosecutorial misconduct required reversal); *McBride*, 228 P.3d at 225-26 (reversal required under plain error standard where prosecutor's misstatement of the law "distorted a key element" that "was a central focus of th[e] trial"); *People v. Nardine*, 2016 COA 85, ¶ 65 (on plain error, courts must review improper arguments in light of "the particular facts and context of a given case").

II. THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY THAT THE OVERDOSE IMMUNITY STATUTE APPLIES TO BOTH THE REPORTER AND THE PERSON WHO SUFFERED THE OVERDOSE, VIOLATING MR. MEDINA'S DUE PROCESS RIGHT TO HAVE EVERY ELEMENT PROVEN BEYOND A REASONABLE DOUBT.

A. Standard of Review and Preservation

This court reviews "jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law." *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). If the jury instructions accurately inform the jury of the law, whether a particular jury instruction should have been

given is reviewed for an abuse of discretion. *People v. Paglione*, 2014 COA 54, ¶ 45.

This issue is preserved. Mr. Medina requested that the trial court instruct the jury with the language in §18-1-711(2), and the court denied the request. TR 8/28/2017, p 193:8-23; TR 8/29/2017, p 54:5-24; 57:13-24.

B. Discussion

Subsection (2) of the overdose immunity statute provides:

> The immunity described in subsection (1) of this section also extends to the person who suffered the emergency drug or alcohol overdose event if all of the conditions of subsection (1) of this section are satisfied.

§18-1-711(2).

Mr. Medina requested that the court instruct the jury with this language, arguing it was critical for the jury to "know that the statute extends to the person that suffers" the overdose. TR 8/28/2017, p 193:8-22. This language is not included in the stock instruction on overdose immunity. *See* COLJI-Crim. H:32 (2017). The court rejected the tendered instruction, noting that it wanted to use "the standard instruction that's been prepared by the Jury Instructions Committee without any amendment." *Id.* at 193:13-20; TR 8/29/2017, p 57:19-22.

In Instruction 14, the jury was instructed with the elements of the affirmative defense as described in subsection (1) of the statute. Instruction 14 read:

> The defendant's conduct was legally authorized if:
>
> 1) he reported in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider, and
>
> 2) he remained at the scene of the event until a law enforcement officer or an emergency medical responder arrived or he remained at the facilities of the medical provider until law enforcement arrived, and
>
> 3) he identified himself to, and cooperated with, the law enforcement officer, emergency medical responder, or medical provider, and
>
> 4) the offense for which defendant is charged arose from the same course of events from which the emergency drug or alcohol overdose event arose.

CF, p 134.

The due process clauses of United States and Colorado Constitutions require the prosecution to prove each element of a crime beyond a reasonable doubt. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§16, 25; *In re Winship*, 397 U.S. 358, 364 (1970); *Garcia*, 113 P.3d at 784. If an affirmative defense is raised, it is treated as though it is an element of the substantive offense. Thus, the prosecution

must disprove the affirmative defense beyond a reasonable doubt. *Garcia*, 113 P.3d at 784; §18-1-407(2).

"It is the duty of the trial court to properly instruct the jury on all matters of law." *Key v. People*, 715 P.2d 319, 323 (Colo. 1986). While an instruction which tracks the statutory language is typically sufficient, "a trial court must tailor instructions to the particular circumstances of a given case when the instructions, taken as a whole, do not adequately apprise the jury of the law." *Idrogo v. People*, 818 P.2d 752, 754 (Colo. 1991). Instructions which do not sufficiently apprise the jury of the law are constitutionally deficient if they prevent the jury from deciding whether every element of the offense has been established beyond a reasonable doubt. *See Key*, 715 P.2d at 323.

Although the jury was instructed with language tracking subsection (1) of the immunity statute, this section is written from the perspective of a third party reporter. It describes what a person who is not at the time suffering from an overdose must do to qualify for immunity—that person must not only report the overdose, but he or she must "remain[] at the scene," "identif[y]" him or herself, and "cooperate[] with…law enforcement." CF, p 134, §18-1-711(1)(b);(c).

Where, as here, a person reports his or her own overdose, these elements do not precisely fit. It is unusual to talk about a person suffering from an overdose as

cooperating and remaining on the scene. Often, these choices are not within the control of a person in the middle of a medical emergency. While they are frequently technically satisfied in that situation, these requirements are logically aimed at a person who reported, but is not suffering from, the overdose.

Thus, without Mr. Medina's requested instruction, the jury could have reasonably believed that Mr. Medina was not entitled to immunity because he suffered from the overdose. The fact that, under the statute, he would be entitled to this immunity in these circumstances is simply not apparent from elements of subsection (1) with which the jury was instructed. Indeed, if subsection (1) adequately conveyed the fact that immunity is extended to both the reporter and sufferer of the overdose, subsection (2) would be superfluous. *See A.S. v. People*, 2013 CO 63, ¶ 12 ("We do not presume the legislature uses language idly, with no intent that meaning should be given to it."); *M.T. v. People*, 2012 CO 11, ¶ 14 ("We avoid constructions that render any term superfluous.").

Accordingly, because the jury could have reasonably interpreted Instruction 14 as not applying to the person who suffered from the overdose, and therefore denied Mr. Medina the affirmative defense on this basis, the tendered instruction informing the jury of subsection (2) was necessary to adequately convey the law to the jury. Thus, the court erred in refusing to instruct the jury with the tendered

instruction. *See Idrogo*, 818 P.2d at 756 (where self-defense instruction did not inform the jury of the duty of no retreat and, based on the instructions given, a reasonable jury could have rejected the affirmative defense based on the defendant's failure to retreat, the trial court erred when it failed to instruct the jury on this issue); *see also People v. Jones*, 2018 COA 112, ¶¶ 49-51 (trial court erroneously failed to instruct the jury that, for the purposes of the "make my day" statute, an "unlawful entry" must have been done knowingly, where the evidence supported defendant's theory that he mistakenly entered the residence).

Moreover, the court's failure to give this instruction violated Mr. Medina's due process rights as it allowed the jury to reject the affirmative defense even if it found the prosecution failed to disprove every element beyond a reasonable doubt. *See Key*, 715 P.2d at 323.

C. The error was neither harmless nor harmless beyond a reasonable doubt, and reversal is required.

This error was neither harmless nor harmless beyond a reasonable doubt. In general, a jury instruction error is not harmless where the language of the instruction creates a reasonable possibility that the jury could have been misled in reaching a verdict. *See People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001).

Here, without the clarifying language in Mr. Medina's tendered instruction, Instruction 14 could have been construed by a reasonable jury to only apply to

third party reporters who did not suffer from an emergency drug or alcohol overdose. This interpretation would have negated the affirmative defense entirely. Thus, by failing to instruct the jury that the immunity extends to the person who suffers the overdose, the court essentially deprived Mr. Medina of the affirmative defense. *See Idrogo*, 818 P.2d at 756 ("A trial court's failure to properly instruct a jury on the applicable law of self-defense deprives the defendant of the right to an acquittal on the ground of self-defense if the jury could have had a reasonable doubt as to whether the defendant acted in necessary self-defense.").

And as discussed, *supra* Section I.C, there was ample evidence supporting the affirmative defense. Mr. Medina reported the overdose to law enforcement in good faith when he told the parole officers that he had swallowed a number of pills and wanted to go to the hospital. TR 8/28/2017, p 133:7-9; TR 8/29/2017, p 35:20-23; 48:2-3. It was undisputed that, to the extent possible, Mr. Medina cooperated with law enforcement and remained on the scene. TR 8/29/2017, p 73:13-14. And the possession of methamphetamine charge arose out of the same course of events as the overdose, as the methamphetamine was discovered during the course of Mr. Medina's emergency medical treatment for the overdose. TR 8/28/2017, p 143:22-144:3; 157:8-15; EX 2, 3.

Based on this evidence, there is a reasonable possibility that the jury would have found that the prosecution did not disprove the affirmative defense beyond a reasonable doubt had it been properly instructed that, as the person who overdosed, Mr. Medina was entitled to immunity under the statute if all of the conditions were met. Thus, the court's failure to instruct the jury with the tendered instruction was not harmless, and reversal is required. *See Jones*, ¶¶ 52-55 (failed to give instruction was not harmless where the lack of instruction "means that the jury might not have evaluated the [affirmative] defense"); *cf. People v. Baca*, 852 P.2d 1302, 1307 (Colo. App. 1992) (instructional error was harmless where it "did not pose any barrier to the jury giving full consideration to the defendant's theory of defense").

III. MR. MEDINA DID NOT OPEN THE DOOR TO THE PREVIOUSLY SUPPRESSED STATEMENTS BECAUSE HE DID NOT CREATE ANY MISIMPRESSION OR ADVERSE INFERENCE.

A. Standard of Review and Preservation

This court reviews evidentiary rulings for an abuse of discretion. *People v. Short*, 2018 COA 47, ¶ 37.

This issue is preserved as Mr. Medina objected to the prosecutor's request to elicit previously suppressed statements, contending that he did not open the door to their admission. TR 3/28/2017, p 134:8-135:5; 136:19-137:9.

B. Discussion

Prior to trial, the court suppressed Mr. Medina's statements that he took seventeen Adderall pills, that he took the pills so his parole officers would not find them, and his denial that he possessed methamphetamine. CF, p 106-111. The court concluded that these statements were obtained in violation of the Fifth Amendment, as they were the product of custodial interrogation and the parole officers never gave Mr. Medina *Miranda* warnings. *Id.*

At trial, the prosecutor elicited from Officer Rohar that he transported Mr. Medina to the hospital. TR 8/28/2017, p 104:9-11; 127:6-7. After Officer Rohar's testimony, a juror asked, "What caused the decision to medically transport [Mr. Medina] to the hospital"? *Id.* at 123:9-10. Officer Rohar responded, "We had reason to believe that Mr. Medina may have a medical emergency." *Id.* at 123:11-12.

During cross-examination of Officer Bensko, Mr. Medina asked, "In your report you stated that you did the transportation for an overdose; is that correct?" and the officer confirmed. *Id.* at 132:1-3.

Thereafter, on redirect, the prosecutor asked the officer why he transported Mr. Medina to the hospital, and the officer responded, "Because he claimed that he

had taken too many prescription pills and he was overdosing. So we took him there for his safety." *Id.* at 133:5-9.

At a bench conference, the prosecutor then asked the court for permission to elicit Mr. Medina's statements that he had taken seventeen Adderall pills and that he had done so to prevent the officers from finding them, arguing that Mr. Medina opened the door to these statements when he asked if the officer took him to the hospital for an overdose. *Id.* at 133:18-136:16. The court allowed the prosecutor to inquire about these statements, ruling:

> However, you [Mr. Medina] have opened up the door to this issue; and in raising the affirmative immunity defense, you've also placed at issue whether your overdose was made in good faith.
>
> That allows the People to show that your ingestion of the Adderall was not done in good faith but had some criminal purpose.

Id. at 137:12-18.

The prosecutor then continued redirect and asked Officer Bensko why Mr. Medina was taken to the hospital. *Id.* at 138:1-2. Officer Bensko testified that Mr. Medina "stated that he had swallowed prescription pills" after they had found the syringes and alcohol. *Id.* at 138:3-13. He further testified that Mr. Medina stated that he took the pills "[t]o avoid us finding it…He did not want us to find the pills." *Id.* at 139:1-4.

On rebuttal, the prosecutor called Officer Rohar back to the stand to testify on this matter because when he had testified in the prosecution's case in chief, "the door hadn't been opened yet." TR 3/29/2017, p 46:5-8. Office Rohar then testified that "[d]uring the searching process" "Mr. Medina admitted to swallowing approximately 17 pills of Adderall." *Id.* at 48:2-10. He further testified that Mr. Medina took approximately three minutes to answer the door after they started knocking, and during that time, they "could hear moving around inside." *Id.* at 48:13-19. When he asked Mr. Medina why he took the pills, Mr. Medina purportedly said, "I did it to prevent you guys from finding them." *Id.* at 48:20-25.

A party opens the door to otherwise inadmissible evidence "by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression." *People v. Murphy*, 919 P.2d 191, 195 (Colo. 1996). The purpose of this doctrine is to "prevent one party in a criminal trial from gaining and maintaining an unfair advantage." *Id.*

Contrary to the court's ruling, Mr. Medina did not open the door to his statements by asking if the purpose of the hospital transport was to treat an overdose. Nothing about this statement creates an "incorrect or misleading impression." *Murphy*, 919 P.2d at 195. Mr. Medina was transported to the hospital because of a suspected overdose, and it was undisputed that he did suffer

from an overdose once at the hospital. *See id.* at 197 (prosecution did not open the door to evidence of the victim's sexual orientation because the evidence did not lead to any inference about the victim's sexual orientation).

The fact that Mr. Medina purportedly stated that he took the pills so the parole officer would not find them is unrelated to the reason he was taken to the hospital. The admission of this statement did not complete the picture for the jury about why Mr. Medina was transferred to the hospital. Instead, it raised unrelated issues about Mr. Medina's parole violations and the potential destruction of evidence.

This case is unlike other cases where courts have found that one party opened the door to evidence that was previously determined to be inadmissible. In *People v. Dunlap*, 124 P.3d 780, 799 (Colo. App. 2004), a division of this court concluded that the defense opened the door to evidence about the district attorney's witness preparation and process of offering witnesses immunity because the defense presented evidence which "portray[ed] the prosecution witnesses as succumbing to the 'white heat' pressure by the district attorney's office to implicate defendant." *Dunlap*, 124 P.3d at 799. Thus, the prosecution's evidence was necessary to "rebut the inferences of improper influence" that the defense created. *Id.*

In contrast, here, there was no adverse interest created by the testimony that Mr. Medina was taken to the hospital for an overdose, and there was nothing about this statement that the prosecution needed to rebut. *Cf. People v. Tenorio*, 590 P.2d 952, 958 (Colo. 1979) (defense opened door to officer's statement that defendant had a gun by asking if the officer had drawn his gun, since this question created an adverse inference that the prosecution was entitled to rebut).

Nor did this evidence result in the jury hearing "only one side of this issue," as in *Golob v. People*, 180 P.3d 1006, 1013 (Colo. 2008). In *Golob*, the trial court prevented the defense's expert on shoeprint analysis from opining on whether the defendant's boots were the source of the footprints recovered from the scene of the crime. However, the prosecution's expert used the defense expert's report in his own testimony to testify that both of their conclusions about the source of the footprints were consistent, even though the defense expert disagreed with this conclusion. The supreme court concluded that this testimony opened the door to the defense expert's own conclusions, because without this testimony the jury only heard the prosecution's side of a contested issue. *Golob*, 180 P.3d at 1012-1013.

But there were not two sides of the story here. Everyone agreed that Mr. Medina was transferred to the hospital because of an overdose. Thus, by asking if

he went to the hospital for an overdose, Mr. Medina did not open the door to his previously suppressed statements to the officers about why he took the pills.

Nor did Mr. Medina open the door to this evidence by raising the affirmative defense of overdose immunity, as the court concluded. As discussed, *supra* Section I.B.1, the overdose immunity statute does not inquire into whether the overdose was "in good faith"—it only requires a good faith *report*. *See* §18-1-711(1)(a). Contrary to the court's ruling, whether Mr. Medina's ingestion of Adderall "had some criminal purpose" is simply not relevant to any element of the affirmative defense. Indeed, according to the statute's plain language, the overdose immunity statute extends to people who have ingested controlled substances unlawfully, and therefore with "some criminal purpose." *See* §18-1-711(3). Thus, the affirmative defense did not open the door to Mr. Medina's statement that he took the pills so the parole officers would not find them. The court erred when it concluded that Mr. Medina opened the door to these statements.

C. The error was not harmless, and reversal is required.

The admission of this evidence was not harmless. The prosecution relied on this testimony to argue (improperly, *see supra* Section I.B.1) that it had disproved the affirmative defense of overdose immunity beyond a reasonable doubt. In

making this argument, the prosecutor repeatedly emphasized this testimony throughout closing statements, contending that Mr. Medina could not have reported the overdose in good faith because he took the drugs to hide them. TR 3/29/2017, p 73:8-12 ("He told the officer that he took the drugs to keep them from finding it. … It's that simple. Right? Both parole officers testified that he said he took the pills. And when asked why he said he took them so you wouldn't find them. Is that good faith?"); 73:23-25 ("Was it reported in good faith? Well, no. When you take something to hide evidence, that's not good faith.").

The prosecutor presented no other evidence and made no other argument to disprove this element of the affirmative defense beyond a reasonable doubt. And as discussed, the evidence supported the affirmative defense. Thus, without this testimony, there is a reasonable probability that the jury would have acquitted Mr. Medina based on the affirmative defense. *See Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000) (error is not harmless if there is a reasonable probability that the inadmissible evidence contributed to the defendant's conviction).

This testimony also undermined Mr. Medina's alternative theory of defense that he did not knowingly possess the methamphetamine. Although Mr. Medina testified at trial that he did not know how the drugs got into his underwear and he had no knowledge of them, TR 3/29/2017, p 37:21-38:15, the prosecutor argued in

closing that "it's common sense that the defendant put the drugs in his pants when he was trying to hid[e] evidence knowing the parole officers were about to walk in his door." *Id.* at 75:24-76:1. Whether or not this inference is "common sense," it is much stronger when combined with the evidence that Mr. Medina had attempted to hide other drugs at that time. Thus, this theory was bolstered by the testimony that Mr. Medina took the pills to hide them.

Without this testimony, the remaining evidence established that Mr. Medina did not try to hide various other parole violations in his room, such as the bottle of alcohol and the syringes. TR 8/28/2017, p 102:10-18. And throughout trial Mr. Medina elicited evidence that he had an acrimonious relationship with the parole officers, which he used to argue that this charge was brought maliciously. *See* TR 8/28/2017, p 108:12-112:23; 172:8-11; TR 8/29/2017, p 29:6-22; 77:10-78:14. Had there not been evidence that Mr. Medina attempted to hide other drugs from the parole officers, his theory that the charge was fabricated would have been more persuasive.

Accordingly, the admission of this testimony undermined both of Mr. Medina's theories of defense. Therefore, the error was not harmless, and reversal is required.

CONCLUSION

For these reasons, Mr. Medina respectfully requests that this court reverse his conviction and remand the case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on January 29, 2019, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's Office through their AG Criminal Appeals account.

K. Root