COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Adams County District Court Honorable Thomas R. Ensor and C. Vincent Phelps, Judges Case No. 08CR838	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. TIMOTHY NEAL VALLEJOS, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 09CA678
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CERTIFICATE OF COMPLIANCE

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

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

STATEMENT OF THE CASE

I. Proceedings Below

The People charged Timothy Vallejos, the defendant, with second-degree burglary in violation of § 18-4-203(1), C.R.S. (2009) and possession of burglary tools in violation of § 18-4-205(1), C.R.S. (2009) (v. 1, p. 1). Following trial, the jury convicted the defendant of second-degree burglary but acquitted him of possession of burglary tools (v. 1, pp. 41-42). The district court sentenced the defendant to four years of probation (v. 1, p. 48). He filed this direct appeal.

II. Statement of the Facts

On March 14, 2008, employees at Nick's Landscaping noticed a maroon truck leaving with metal wire racks in the back of the truck (v. 8, p. 126). Employees contacted the police (v. 8, pp. 128, 139-40). An officer pulled the defendant over and found twenty metal wire racks in the defendant's truck taken from a shed at Nick's Landscaping (v. 8. pp. 192-93; v. 9, p. 7).

At trial, the defendant argued an employee on a forklift gave him permission to take the metal racks the day before the incident (v. 9, pp. 63-64). However, the evidence at trial established that no one was working at

Nick's Landscaping and there were no forklifts on the property at the time the defendant claimed he received permission (v. 8, pp. 168, 174).

SUMMARY OF THE ARGUMENT

Officer Trujillo's testimony related only to his own experiences and observations. Accordingly, his opinion that the defendant's shoes and tires matched the prints found in the shed did not constitute expert testimony. Moreover, as the defendant conceded at trial that he was in the shed and took the metal wire racks, he is unable to establish prejudice.

Likewise, the witness' testimony that they had previously seen a truck like the defendant's did not constitute prior bad evidence. Explaining that they had seen his truck did not establish nor indicate that the defendant had committed previous bad acts. Indeed, one witness explicitly stated that he had seen the defendant before because he had sold the company wood pallets. Therefore, the defendant's argument that the trial court erred in not sua sponte ordering a Spoto analysis is misplaced.

Finally, the prosecutor's comments in closing argument did not deprive the defendant of due process or a fair trial, and they do not warrant reversal of the defendant's convictions.

ARGUMENT

I. The trial court properly admitted Officer Trujillo's testimony explaining what he had observed.

A. Factual Background

During trial, the People called Officer Trujillo (v. 9, pp. 12-30). He explained that on the date of the incident, he was assigned to take photographs of the crime scene (v. 9, p. 13). In particular, Officer Trujillo took photos of "fresh footprints" leading into the shed and tire marks on the ground near the shed (v. 9, pp. 16-22).

Subsequently, the prosecutor asked Officer Trujillo if he was "able to decipher anything from those tire marks" (v. 9, p. 22). The officer explained that the "tire marks appeared to be fresh" and "[t]hey also appeared to match the tires that were from the suspect's vehicle" (v. 9. p. 22). The defendant objected, arguing, "I believe that's getting into the area of expert testimony. He's not been certified" (v. 9, p. 22). The court stated that "if it's based upon his observations . . . you need to lay a foundation" (v. 9, p. 22). Accordingly, Officer Trujillo testified that he had seen the defendant's vehicle, taken pictures of the tires, and that in his previous experiences, he had compared pictures of tire marks "as a level of a police officer, not as a level of a SSI investigator" (v. 9, p. 23). The trial court found a proper

foundation had been laid and overruled the defendant's objection (v. 9, p. 23).

Later, the prosecutor asked the officer in his fifteen years of working burglary cases, if he ever "had compared footprints on the ground to footprints of someone's shoe" (v. 9, pp. 24-25). Officer Trujillo testified that he had at least "50" times, and the prosecutor inquired what were his results in comparing the footprints found near the shed with the defendant's shoes (v. 9, p. 25). Over the defense's objection for lack of foundation, Officer Trujillo explained that "it appears that the footprints made in the dirt matched the shoes that the defendant was wearing" (v. 9, p. 25).

B. Standard of Review

The People agree that "A trial court has broad latitude in determining whether a lay witness is qualified to express opinions," as such, "only if there is an abuse of discretion will the trial court's decision be disturbed on review." People v. Caldwell, 43 P.3d 663, 667 (Colo. App. 2001); (see Opening Brief, p. 22). The defendant preserved his objection below (v. 9, p. 22).

C. Law and Analysis

Colorado Rule of Evidence 701 governs the admission of lay opinions as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The determination of whether a witness's testimony is lay or expert testimony turns on "whether it depended on a process of reasoning familiar in everyday life or on a process that can be mastered only by specialists in the field." People v. Malloy, 178 P.3d 1283, 1288-289 (Colo. App. 2008). For example, in People v. Mollaun, 194 P.3d 411 (Colo. App. 2008) (J. Roy dissenting), a police officer testified that the defendant's eyes at trial were not dilated and that the defendant's pupils appeared "significantly smaller than they were when [the officer] was shining [his] light on them." Id. at 420. In concluding that the trial court did not err in admitting the officer's testimony as lay opinion testimony, the court concluded that was so "Because an ordinary person reasonably could have come to have such an opinion based on a process of reasoning familiar in everyday life." Id.

Accordingly, the fact that a witness has specialized knowledge does not automatically render his testimony expert opinion. See People v. Souva, 141 P.3d 845, 850-51 (Colo. App. 2005). Similar to Mollaun, in the present

case, Officer Trujillo's testimony was limited to what he observed. First, when testifying about the tires, Officer Trujillo simply stated that based on his observations, the defendant's tires matched that of the tire prints found near the shed. Likewise, Officer Trujillo relied on his personal observations when testifying that the defendant's shoes matched that of the prints left near the shed. Therefore, it required no special expertise for Officer Trujillo to observe what he testified to at trial, and his testimony was properly admitted. See People v. Stewart, 55 P.3d 107, 125 (Colo. 2002) (officer's lay testimony about what he saw or perceived neither required nor involved specialized knowledge); see also United States v. Ayala-Pizarro, 407 F.3d 25, 29 (1st Cir. 2005) (officer's testimony, based on his personal experiences and relating to how drug dealers typically package heroin for distribution, was not expert testimony, and thus, was properly admissible under Federal Rule of Evidence 701); United States v. Novaton, 271 F.3d 968, 1007-1009 (11th Cir. 2001) (affirming the district court's decision to allow agents to give non-expert opinion testimony based on their perceptions and experiences as police officers about the meaning of code words employed by the defendants).

To the extent that some of Officer Trujillo's comments extended to the realm of opinion testimony, those opinions were founded on personal

observations and experience rather than specialized training. For example, in People v. Rincon, a panel of this court concluded that the trial court did not err in allowing a police officer to provide lay testimony about the likelihood of picking offenders out of photo arrays. 140 P.3d at 983. The Rincon court explained, "[A]lthough the officer had experience with photo arrays that an ordinary citizen would not have had, the opinion the officer expressed was one which could be reached by any ordinary person." Id. As Officer's Trujillo's testimony that the defendant's tires and shoes matched the prints found at the crime scene could be reached by any ordinary person, it did not rise to the level of expert testimony and was properly admitted.

In a similar vein, the defendant's alternative argument that even if the testimony was properly admitted as lay testimony, it was not admissible because it lacked proper foundation, fails (Opening Brief, pp. 17-18). While the defendant lists a laundry list of additional details the officer could have provided (Opening Brief, p. 18), such information is relevant to weight not admission. See Gonzales v. People, 477 P.2d 363, 365 (Colo. 1970). At trial, the officer explained his opinion was based on his prior experiences and a comparison between pictures he took from the footwear and tire impressions found at the crime scene with the defendant's shoes and tires (v. 9, pp. 22-25). Therefore, the trial court appropriately found there was

sufficient foundation for Officer Trujillo's testimony. See, e.g. Souva, 141 P.3d at 850 (finding sufficient foundation for lay opinion that defendant was in drug-induced state when witness testified she was a certified addictions counselor and had a chance to observe the defendant's behavior the night of the murder).

Regardless, contrary to the defendant's claim, any error in admitting the testimony was harmless. The defendant urges this Court to find that the testimony "was devastating to Mr. Vallejos's defense because it undermined his insistence that he had permission to enter the shed and take the racks" (Opening Brief, p. 16). However, evidence establishing the defendant was in the shed was probative of identity, not whether he had permission to enter. As the defendant submitted below that he was in the shed and took the racks (v. 8, pp. 120-22; v. 9, pp. 63-71), any error in admitting the evidence was harmless. See Stewart, 55 P.3d at 125 (finding trial court's error in allowing an officer to testify about accident reconstruction without being qualified as an expert harmless when there was "fair assurance that . . . the officer's reconstruction testimony did not influence the jury's verdict or render the trial unfair").

The admission of this evidence also did not surprise the defense thereby preventing the defendant from appropriately cross-examining the

witness. Although the defendant concludes on appeal that lack of notice "impinged upon Mr. Vallejos's ability to refute the officer's testimony, thereby causing him to lose credibility with the jury" (Opening Brief, p. 17), the defendant never requested a recess or a continuance at trial. His failure to do so discredits any claim of prejudice. See People v. Wieghard, 727 P.2d 383, 386 (Colo. App. 1986).

In any event, given that the record establishes that Officer Trujillo was amply qualified because of his training and experience to testify as he did, the defendant's argument fails. See People v. Lomanaco, 802 P.2d 1143 (Colo. App. 1990) (finding no reversible error in trial courts allowance of expert testimony even though trial court never qualified agent as an expert witness, when "the admission of the agent's expert testimony amounted to an implied finding by the trial court that the witness was qualified to give expert testimony" and the foundation questions implied that the agent was an expert); see also Malloy, 178 P.3d at 1288-289; U.S. v. Ramsey, 165 F.3d 980, 984 (D.C. Cir. 1999) (admission of opinion testimony, given by a Drug Enforcement Administration regarding drug trade was not plainly erroneous, while agent was not formally qualified expert).

II. The witnesses' reference that they had "previously seen" the defendant's truck did not constitute prior bad act evidence.

A. Factual Background

During trial, the People called Ms. Brace, an employee of the business next-door to Nick's Landscaping (v. 8, pp. 123-24). At one point, the prosecutor asked Ms. Brace if she had viewed the defendant's maroon truck enter the property before the date of the charged burglary (v. 8, p. 129). Defense counsel objected, arguing it was irrelevant and had "nothing to do with the crime before the Court" (v. 8, p. 129). The court overruled the objection (v. 8, p. 129). Ms. Brace explained that, "I can't tell you exactly what dates. I know that we've seen the maroon truck a couple other times. But the other times that we had seen it, it was usually driving out and we didn't know which way they would go and we didn't have a license plate number" (v. 8, pp. 129-30).

Later, the People called Mr. Montoya, the person that called the police after seeing the defendant's truck pull-up to the shed (v. 8, p. 139). When the prosecutor asked Mr. Montoya why he called the police, Mr. Montoya explained that he had previously informed the owner of Nick's Landscaping that metal wire racks were being stolen, and as a result, the owner instructed him to call the police if he saw the guy again (v. 8, p. 140). The defense

objected, arguing that the statement implies "that he had seen [the defendant] commit this offense before" (v. 8, p. 140). The court held that if the prosecution wanted "to go there," it needed to lay proper foundation (v. 8, p. 140). The prosecutor stated she would "move away from that," and the court sustained the defense's objection (v. 8, pp. 140-41).

The prosecutor later asked Mr. Montoya if he had seen the red truck the day before the burglary (v. 8, p. 141). Mr. Montoya explained that he had seen the truck "two or three times," but he could not remember the dates (v. 8, p. 141). The defendant objected and the trial court overruled it (v. 8, p. 141). During re-direct, the witness confirmed that he saw the defendant's truck twice for sure, and that they had previously bought wood pallets from the defendant (v. 8, pp. 145-46).

B. Standard of Review

The People agree that the trial court is granted substantial discretion to decide questions concerning the admissibility of other acts evidence (Opening Brief, p. 19). Douglas v. People, 969 P.2d 1201, 1204-1205 (Colo. 1998). Absent a showing that the court has abused its discretion, an appellate court should affirm the trial court's evidentiary ruling. Id.

The People disagree, however, that the defendant preserved his objection below. Although the defendant tendered an objection at trial, he

never argued that the trial court should undergo a CRE 404(b) analysis before admitting the testimony. Thus, his objections did not preserve the claim he pursues on appeal and plain error applies. See, e.g., People v. Kruse, 839 P.2d 1 (Colo. 1992); People v. Lopez, 129 P.2d 1061, 1064 (Colo. App. 2005).

C. Law and Analysis

The prosecution may introduce evidence of other acts of the defendant to prove the commission of the offense as charged for any purpose other than propensity, including: refuting defenses such as consent or recent fabrication; showing a common plan, scheme, design or modus operandi, regardless of whether identity is at issue; showing motive, opportunity, intent, knowledge, identity, or for any other matter for which it is relevant. CRE 404(b).

In order to introduce evidence of previous drug transactions involving the defendant, the other acts evidence must meet the following four-part test: (1) the proffered evidence must relate to a material fact in the case; (2) it must be logically relevant to the material fact; (3) the logical relevance must be independent of the inference prohibited by CRE 404(b) that the defendant committed the crime charged because of his criminal propensities; and (4) the probative value of the evidence must not be substantially outweighed by

the danger of unfair prejudice. People v. Spoto, 795 P.2d 1314, 1318 (Colo. 1990).

In the present case, the defendant submits "The two recycling plant employees testified only that they saw a truck like [the defendant's] at Nick's Landscaping before the charged offense" (Opening Brief, p. 23). Yet, in his view, this testimony by the two employees suggested that the defendant previously had stolen from Nick's Landscaping. As a result, he argues the court should have required the People to establish the Spoto factors before admitting the evidence.

However, there is no basis in the record to support the defendant's conclusion. Ms. Brace only testified that she had seen a "maroon truck" before, and Mr. Montoya indicated that they had previously seen the defendant because he had sold them wood pallets. Accordingly, as the witnesses never testified that it was a crime to drive around the property or that it was crime to sell wood pallets, the witnesses' testimony did not refer to a previous bad act. A Spoto analysis under CRE 404(b) was not required.

Moreover, any error was harmless. As explained above, the defendant admitted at trial that he had taken the metal wire racks. The case turned on whether the jury believed the defendant's story that an employee of Nick's Landscaping sitting on a forklift gave the defendant permission to take the

racks. As the overwhelming evidence at trial established that no one was working at Nick's Landscaping at that time and there were no forklifts on the property (v. 8, pp.168, 174), the defendant is unable to establish error, let alone plain error. See, e.g. People v. Weinreich, 119 P.3d 1073, 1078 (Colo. 2005) (to constitute plain error, the trial court's error must be obvious and substantial and so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction).

III. There was no prosecutorial misconduct requiring reversal.

A. Factual Background

During the prosecutor's closing argument, the following exchange occurred:

> **Prosecutor:** Then we go to knowingly, meaning was Mr. Vallejos out of his mind? Was he sleepwalking? Was he – did he know what he was doing? Of course he knew what he was doing.
>
> **Defense counsel:** Objection, Your Honor, that's a misstatement of the law.
>
> **The court:** It's closing argument. I'll give you both some latitude.
>
> **Prosecutor:** Again, I'm not going to read to you the definition of knowingly. You have that. But the question is, later on when you read the definition of knowingly, did he know what he was doing? Did he know the nature of his conduct. Did he know the circumstances surrounding that

> conduct? Yes, he did. He knows what he as doing when he went into the shed. He knew that he didn't have permission.

(v. 9, p. 54).

B. Standard of Review

The People agree that the defendant preserved his objection (v. 9, p. 54). However, claims of improper argument to which a contemporaneous objection is made are reviewed for non-constitutional harmless error, not constitutional harmless as the defendant suggests. Crider v. People, 186 P.3d 39, 42 (Colo. 2008). Under this standard, any error is harmless if there is no reasonable probability that it contributed to the defendant's conviction. Id.

C. Law and Analysis

The scope of closing argument is within the trial court's discretion. Dunton v. People, 898 P.2d 571 (Colo. 1995). Statements in closing argument must be considered in the context of the rest of the argument. Walker v. People, 932 P.2d 303, 322 (Colo. 1997).

A prosecutor may not intentionally misstate the law. People v. Rodriguez, 794 P.2d 965, 977 (Colo. App. 1990). He or she may, however, use "rhetorical devices and ... engage in oratorical embellishment and metaphorical nuance," so long as the argument does not induce a verdict

based on prejudice or irrelevant matter." See generally, People v. Washington, 179 P.3d 153, 168 (Colo. App. 2007), aff'd on other grounds, 186 P.3d 594 (Colo. 2008).

In the present case, the defendant argues that the "prosecutor's statement may have given the jury the impression that in order to satisfy the mens rea requirement of second degree burglary, it need only find that Mr. Vallejos was more aware of his conduct than he would have been had he been sleepwalking or "out of his mind" (Opening Brief, p. 29). However, the prosecutor's statements were no more than oratorical embellishment and were not unfairly prejudicial. See People v. Hastings, 983 P.2d 78, 83 (Colo. App. 1998) (finding that prosecutor's comments that defendant's home was a "flophouse" that housed runaway teenagers was proper oratorical embellishment used to emphasize conditions in defendant's home). Indeed, following the defendant's objection, the prosecutor clarified that the jury should refer to the definition of "knowingly" in the instructions and the questions was whether the defendant "knew" what he was doing. Therefore, taken in its proper context, the prosecutor's argument did not misstate the law.

To be sure, to the extent the defendant argues the trial court should have provided the jury with a curative instruction because it is possible the

jury applied the incorrect mens rea (Opening Brief, p. 29), "[t]o receive a curative instruction in this context, a defendant must request it . . . [and] a trial court does not commit plain error if it does not give a curative instruction sua sponte." People v. Mersman, 146 P.3d 199, 204 (Colo. App. 2006); see People v. Valencia-Alvarez, 101 P.3d 1112 (Colo. App. 2004) (trial court not required to issue sua sponte curative instruction in drug trial after prejudicial remarks by prosecutor). Moreover, the jury was specifically instructed that it was the court's duty to decide what rules of law applied to the case, and "While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them" (v. 1, p. 22). It is presumed that jury heeded these instructions, and the defendant's argument fails. See People v. Rosa, 928 P.2d 1365, 1372 (Colo. App. 1996); People v. Smith, 685 P.2d 786 (Colo. App. 1984) (when jury instructed that closing arguments should not be considered as evidence, reviewing court must presume that the jury heeded these instructions).

CONCLUSION

For the foregoing reasons and authorities, the judgment of the trial court should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **Mark Evans**, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 30th day of December 2009