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| <p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203</p> | |
| <p>Adams County District Court Honorable Thomas R. Ensor & C. Vincent Phelps Case Number 08CR838</p> | |
| <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>TIMOTHY NEAL VALLEJOS</p> <p>Defendant-Appellant</p> | <p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p> |
| <p>Douglas K. Wilson, Colorado State Public Defender MARK EVANS, #40156 1290 Broadway, Suite 900 Denver, CO 80203</p> <p><u>Appellate.pubdef@coloradodefenders.us</u> (303) 764-1400 (Telephone)</p> | <p>Case Number: 09CA678</p> |
| <p style="text-align: center;">REPLY BRIEF OF DEFENDANT-APPELLANT</p> | |

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| <p style="text-align: center;">CERTIFICATE OF COMPLIANCE</p> | |

I hereby certify that this reply 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:

The reply brief complies with C.A.R. 28(g).

~~Choose one:~~

- It contains 1,930 words.
- It does not exceed 18 pages.

A handwritten signature in black ink, reading "Mark Evans". The signature is written in a cursive style with a long horizontal line extending to the right.

In response to matters raised in the Attorney General’s Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant Timothy Neal Vallejos submits the following Reply Brief.

ARGUMENT

I. A lay witness may not testify to opinions or inferences based on scientific, technical, or specialized knowledge. Here, a lay witness testified to an opinion based on specialized knowledge — specifically, that footwear impressions left at the crime scene “matched” Mr. Vallejos’s shoes, and that tire impressions came from his truck. The district court erred by allowing that testimony to come from a lay witness.

The State asserts that Officer Trujillo’s opinion was that of a layman because his testimony was “limited to what he observed” and he “relied on his own personal observations when testifying that the defendant’s shoes matched that of the prints left near the shed.” (Answer, p.7) However, this assertion is contrary to both common sense and legal precedent.

As a matter of common sense, all human output is based upon sensory input. Nearly everything that people say, whether it is trial testimony or table talk, is the product of personal observation. Consequently, the proper inquiry for evaluating whether a witness’s testimony is “expert” or “lay” is not how or what the witness observed, but how the witness processed observations to form an opinion. *See People v. Malloy*, 178 P.3d 1283, 1288 (Colo. App. 2008) (characterization of testimony should be based 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 a field”). The fact that Officer Trujillo relied on his observations has no bearing on whether or not his ultimate opinion — that impressions on the ground were made by certain shoes or tires — was that of an expert. (Vol.IX, pp.22, 25)

The precedent upon which the State relies to support its argument pertains only to witnesses’ opinions based on observations that were not processed in a way which required specialized knowledge. (Answer, pp.6, 8) In *People v. Mollam*, 194 P.3d 411, 419 (Colo. App. 2008), a police officer testified that an individual’s pupils were not dilated and that they were smaller at one time than they had been at another. This Court justifiably concluded that opinions based on such observations — a change in the size of a body part common to nearly every human being — were “based on a process of reasoning familiar in everyday life.” *Id.* at 419-20. Thus, expert qualification was not required. *Id.* at 420. Similarly, in *People v. Rincon*, 140 P.3d 976, 982-83 (Colo. App. 2005), this Court addressed a non-expert police officer’s opinion that “when an incident happens fairly quickly . . . people sometimes [are] unable to make any sort of identification.” This Court made the common-sense finding that the officer’s opinion was one that could be reached by any ordinary person. *Id.* at 983.

Here, however, Officer Trujillo's opinion was not one that could be formed by any ordinary person. Matching impressions on the ground to specific tires or shoes requires a mental processing of observations that ordinary citizens are not qualified to perform. The State's assertion to the contrary (Answer, p.8) implies that *anyone* could perform such matches. This view is refuted by the Colorado Bureau of Investigation, and by literature in the field. See Colorado Bureau of Investigation, *Physical Evidence Handbook* XI-1 to XI-6 (2007) available at http://cbi.state.co.us/lab/pdf/Physical_Evidence_v5_1.pdf (explaining detailed procedures for preserving such evidence for laboratory evaluation); William J. Bodziak, *Footwear Impression Evidence: Detection, Recovery, and Examination* (2d ed. 2000); William J. Bodziak, *Tire Tread and Tire Track Evidence: Recovery and Forensic Examination* 261 (2008).

The State's argument that any error was harmless misunderstands the point of Officer Trujillo's testimony. (Answer, p.9) Contrary to the State's assertion, the shoe and tire impression analysis was not probative of merely *who* entered the shed at Nick's Landscaping, but *where* that person entered. At trial, the prosecution used Officer Trujillo's testimony to show that Mr. Vallejos entered the shed at a point inconsistent with having permission to be there. (Vol.IX, pp.18-19, 57-58) Thus, the

fact that Mr. Vallejos readily admitted he was at the shed and took the racks does not render the district court's error harmless.

Also contrary to the State's assertion, Mr. Vallejos was not required to request a recess or a continuance in order to illustrate prejudice. (Answer, p.10) Once the district court ruled that Officer Trujillo's testimony did not require expert qualification, (Vol.IX, pp.22-25), Mr. Vallejos had no grounds on which to request a continuance. It is that initial ruling — that expert qualification was not required — to which Mr. Vallejos contemporaneously objected and now appeals.

Finally, the State's comparison between this case and *People v. Lomanaco*, 802 P.2d 1143 (Colo. App. 1990), is misplaced. In *Lomanaco*, this Court found that the trial court's "technical failure" to qualify a witness as an expert did not — in the absence of an objection — amount to plain error. *Id.* at 1145. In reaching its conclusion, this Court noted that testimony in question "bore on an issue freely conceded by [the] defendant" *Id.* Such is not the case here. The district court did not "technically" fail to sua sponte qualify Officer Trujillo as an expert. Rather, it directly overruled Mr. Vallejos's contemporaneous objection to improper and potentially outcome-determinative testimony that he had no way to refute. (Vol.IX, pp.22-25)

II. Trial courts can admit evidence of a defendant's uncharged acts only after completing the analyses prescribed in *People v. Garner* and *People v. Spoto*. Here, the district court admitted evidence of Mr. Vallejos's prior acts without conducting either the *Garner* or the *Spoto* analysis. The district court thus erred by admitting the evidence.

The State contends that Mr. Vallejos did not preserve his objection to the admission of prior acts, and that the plain error standard of review should apply. (Answer, pp.12-13) However, Mr. Vallejos objected to the admission of this evidence with sufficient specificity to fulfill the underlying purposes of the contemporaneous objection doctrine, thus requiring application of the abuse of discretion standard. (Vol.VIII, pp.129, 140, 141)

The purpose of the contemporaneous objection doctrine is to alert the trial court to a particular issue and to give the court the opportunity to correct any error that could jeopardize a defendant's right to a fair trial. See *United States v. Jefferies*, 908 F.2d 1520, 1524 (11th Cir. 1990); *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). This case is clearly distinguishable from those in which a defendant voiced no opposition to an error at trial. Rather, Mr. Vallejos alerted the district court to the issue as soon as the prosecution attempted to admit evidence of prior acts, and provided the court with the opportunity to ensure that the evidence was properly evaluated before admission. (Vol.VIII, pp.129, 140, 141) Additionally, Mr. Vallejos

filed a “Notice of Objection to Admission of Any Crimes Wrongs or Acts.” (Vol.I, p.16) Consequently, application of the plain error standard is inappropriate.

Regarding the merits of this issue, the State asserts that there is no basis in the record to conclude that the testimony of two Nick’s Landscaping employees suggested that Mr. Vallejos had previously stolen from Nick’s Landscaping. (Answer p. 14) This assertion defies common sense and is legally irrelevant.

As a matter of common sense, the State’s argument raises the question of for what purpose the prosecution introduced this evidence if not to suggest that Mr. Vallejos had previously stolen from Nick’s Landscaping. If the evidence was intended to show that Mr. Vallejos had previously been on the premises for non-criminal purposes, the prosecution’s decision to present it is beyond explanation.

More importantly, whether the evidence was intended to illustrate prior criminality is legally irrelevant. CRE 404(b) and *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990), prescribe procedures that trial courts must employ when admitting evidence of *any* prior acts, not just prior “bad acts” or “criminal acts.” Whether the employees’ testimony plainly stated that a prior criminal act had occurred is of no consequence. As explained in the Opening Brief, what matters is that evidence of prior acts was admitted over Mr. Vallejos’s objection, without the proper procedural

safeguards, and likely influenced the jury's evaluation of his theory of defense. (Vol.VIII, pp.129-30, 140-41)

The State's argument that any error by the district court was harmless misinterprets the evidence presented and misunderstands Mr. Vallejos's theory of defense. This case turned on whether Mr. Vallejos had permission to take metal racks from a shed on the property of Nick's Landscaping. Mr. Vallejos argued that he had received such permission from a man on a forklift. (Vol.VIII, pp.200-02, 206-07; Vol.IX, pp.63-64) His theory of defense did not rely on the more specific proposition that an "employee of Nick's Landscaping sitting on a forklift gave the defendant permission" (Answer, p.14) The fact that the property in question was not being actively used by Nick's Landscaping at the time of the alleged burglary (Vol.VIII, pp.149-50) does not amount to overwhelming evidence that there was nobody on a forklift in this commercial area who could have given Mr. Vallejos permission to take the racks. Evidence was presented regarding the presence of other forklifts in the vicinity. (Vol.VIII, p.132) Consequently, this Court cannot find that the district court's error was harmless on the basis of overwhelming evidence.

III. Prosecutors may not misstate the law in closing argument. Here, the prosecutor stated in closing that whether Mr. Vallejos acted “knowingly” required determining whether he was “out of his mind” or “sleepwalking.” The district court erred in overruling an objection to this statement.

The State contends that claims of improper argument by the prosecution may only be reviewed for non-constitutional harmless error. (Answer, p.16) Such is not the case. “Depending upon the way in which argument is improper, and the particular risk it poses or right upon which it infringes, prohibited comments during closing argument may well, but need not, amount to constitutional error.” *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008).

Regarding the merits of this issue, the State contends that the prosecutor’s characterization of the “knowingly” mens rea was merely an “oratorical embellishment.” (Answer, p.17) It is true that lawyers in closing argument may add an editorial flair to the facts of a case. However, the State has provided no authority for the proposition that a trial court’s failure to sustain a contemporaneous objection to a prosecutor’s obvious misstatement of the statutory law of the State of Colorado is anything other than an abuse of that court’s discretion. *Cf. Longinotti v. People*, 46 Colo. 173, 174, 102 P. 165, 166 (1909) (district attorney’s mischaracterization of the elements of first degree murder required reversal of judgment); *State v. Jones*, 615 S.W.2d 416, 418, 420 (Mo. 1981) (prosecutor’s misstatement of reasonable doubt standard required reversal).

Additionally, the State seems to assert that in order for Mr. Vallejos to prevail on this issue he must have requested some form of curative instruction from the district court. (Answer, pp.17-18) However, the district court explicitly overruled his objection to the prosecutor's misstatement of the law. (Vol.IX, p.54) Consequently, there was no opportunity for Mr. Vallejos to request anything further from the court; much less an instruction curing a situation that the court had just stated did not need to be cured.

CONCLUSION

Based on the foregoing arguments and authorities, and on those presented in the Opening Brief, Mr. Vallejos respectfully requests that this Court vacate the district court's judgment of conviction for second degree burglary.

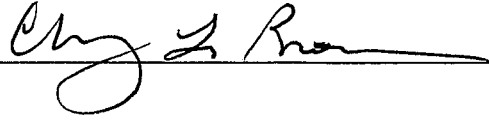
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CERTIFICATE OF SERVICE

I certify that, on January 11, 2010, a copy of this Reply Brief of Defendant-Appellant was served on John T. Lee of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us:

A handwritten signature in cursive script, appearing to read "Amy L. Brown", is written over a horizontal line.