

<p>COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Ave., Suite 800 Denver, Colorado 80202</p>	
<p>Pueblo County District Court Honorable Victor Reyes Case Number 09CR1656</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee</p> <p>v.</p> <p>Kelly Oslund Defendant-Appellant</p>	<p>COURT USE ONLY</p>
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<p style="text-align: center;">REPLY BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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


Choose one:

- It contains no more than 5,700 words; the brief contains 1,735 words.
- It does not exceed 18 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

The applicable standard of appellate review with citation to authority and citation to record is set forth in the Amended Opening Brief.


Katherine Brien, #18721

In response to matters raised in the Attorney General's Answer Brief (AB), and in addition to the arguments and authorities presented in the Amended Opening Brief (AOB), Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. THE DISTRICT COURT REVERSIBLY ERRED AND VIOLATED COLORADO STATUTES AND MR. OSLUND'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO A JURY TRIAL, TO DUE PROCESS, AND TO A FAIR TRIAL BY FAILING TO INSTRUCT THE JURY, AS REQUESTED BY DEFENSE COUNSEL, ON DEFENSE-OF-PROPERTY PURSUANT TO C.R.S. § 18-1-706.

In the Amended Opening Brief (AOB), Kelly Oslund asserted that a person is justified in using physical force to prevent what he reasonably believes to be an attempted theft by another when the other is in immediate flight from the then-occurring attempted theft.(AOB,pp16-27) Mr. Oslund set forth the applicable statutes and argued, among other things:

(1) the plain language of C.R.S. § 18-1-706 and C.R.S. § 18-4-401(1) support the position that a person is justified in using physical force to prevent what he reasonably believes to be an attempted theft by another when the other is in immediate flight from the then-occurring attempted theft (AOB,pp18-20);

(2) assuming, arguendo, C.R.S. § 18-1-706 is ambiguous, the rule of lenity requires this Court to construe any ambiguity in favor of Mr. Oslund (AOB,p20);

(3) assuming, arguendo, C.R.S. § 18-1-706 is ambiguous, a just and reasonable result is achieved by interpreting the statute to apply when a person uses physical force to prevent what he reasonably believes to be an attempted theft by another and the other is in immediate flight from the then-occurring attempted theft; a contrary interpretation would render the statute unconstitutional (AOB,pp21-22);

(4) *People v. Scarce*, 87 p.3d 228 (Colo.App.2004), and *People v. Goedecke*, 730 p.2d 900 (Colo.App.1986) are distinguishable because neither involved the use of physical force to prevent a then-occurring attempted theft by another when the other was in immediate flight from the then-occurring attempted theft (AOB,pp22-25); and

(5) no court can apply an unforeseeable interpretation of C.R.S. § 18-1-706 to Kelly Oslund because a court's retroactive application of an unforeseeable interpretation of a state law deprives a criminal defendant of due process (AOB,25-26).

The state did not address any of the above statutory construction arguments in the Answer Brief.(*See* AB,pp5-15) Rather, the state argued that a panel of this

Court concluded in *People v. Jayson Oslund*, __ P.3d __, Case No. 10CA2049 (Colo.App.April 12, 2012), *petition for rehearing and/or certiorari may be pending*, that even though Jayson and Kelly were in “fresh pursuit” of Maez when they ran after him, the trial court did not err in Jayson Oslund’s case when it did not provide an instruction to the jury regarding defense of property.(AB,p13) The state further argued that “[t]he evidence in *Oslund* was almost identical to the evidence here, as the testimony was based on the same incident.”(AB,p14)

The undersigned counsel did not, and does, not represent Jayson Oslund and Jayson’s and Kelly’s cases were not jointly tried. As such, the undersigned counsel does not know whether the evidence presented in Jayson Oslund’s trial was “almost identical” to the evidence presented in Kelly Oslund’s trial, as argued by the state. However, the statutory construction arguments raised in this appeal on behalf of Kelly Oslund were not raised in *People v. Jayson Oslund*, __ P.3d __, Case No. 10CA2049 (Colo.App.April 12, 2012), and the authorities cited in this appeal were not presented in *Oslund, supra*.

Appellate counsel for Jayson Oslund asserted in the Opening Brief filed in Case No. 10CA2049 that the district court erred by failing to permit an affirmative defense in Jayson Oslund’s trial.(Court of Appeals, Case No. 10CA2049, flat file) Jayson Oslund’s counsel cited only six cases in her argument and did not assert any constitutional errors under the United States and Colorado Constitutions.(*Id.*)

Kelly Oslund, on the other hand, has raised numerous statutory construction arguments as well as constitutional claims, including retroactive application of judicial interpretation of a statute, under both the United States and Colorado Constitutions.(AOB, Argument I,pp1-37) The arguments raised in this case were not presented, heard or decided in Jayson Oslund’s case. Consequently, Kelly Oslund asserts that *People v. Jayson Oslund, supra*, is distinguishable and inapplicable. Further, Kelly Oslund asserts that *People v. Jayson Oslund, supra*, was incorrectly decided.

In light of the applicable statutes, rules of statutory construction and authorities presented in Argument I of the Amended Opening Brief filed in this case, a person is justified in using physical force to prevent what he reasonably believes to be an attempted theft by another when the other is in immediate flight from the then-occurring attempted theft. As argued in the Amended Opening Brief (AOB,pp1-26), Kelly Oslund had the constitutional and statutory right to defend his property from Maez’s attempted theft. *See, e.g.*, C.R.S. §§ 18-1-706, 18-1-407; U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 3, 16, 23, 25; AOB, Argument I.

Whether or not Kelly acted justifiably, pursuant to C.R.S. § 18-1-706, “to prevent what he reasonably believe[d] to be an attempt by the other person [Maez] to commit theft” was a question of fact for the jury, which the district court had a

duty to instruct the jury on. Under the facts of this case, the district court reversibly erred and violated Kelly Oslund's constitutional rights by rejecting Defense Tendered Instructions 1 and 5.

As noted in the Amended Opening Brief (AOB,pp27-32), appellate courts consider whether sufficient evidence exists to support a defendant's requested affirmative defense instruction in the light most favorable to the defendant. *E.g.*, *Cassels v. People*, 92 P.3d 951, 955 (Colo.2004).

In Kelly's trial, there was an abundance of evidence supporting the defense-of-property instructions. Jessica O'Brien and Lucas Maldonado saw Maez attempting to steal from the Oslunds' car.(cd,6/30/10,pp159-161,169,176-178;7/1/10,pp25-26,56-57) When Maez jumped from the car, a deck of the car fell out of his pocket.(cd,6/30/10,p161) Jessica immediately alerted the Oslunds that someone was stealing from their car.(cd,6/30/10,pp97-99,123-126,161,179-180;cd,7/1/10,pp245-246;env.2,P.E.60) Everyone ran out front; items from the Oslunds' car were strewn on the ground; Kelly noticed tools missing from the car; and the Oslunds immediately ran after Maez.(cd,6/30/10,pp98-102,123-126,162-163,180-182,186;cd,7/1/10,pp245-246;env.2,P.E.60) The Oslunds caught up with Maez (who was wearing a sweatshirt belonging to the Oslunds), recovered their property, and returned to the O'Brien residence within twenty-five minutes.(cd,6/30/10,pp164-165) Kelly stated that he reached into Maez's pockets

and grabbed what was his.(cd,6/30/10,p107) The police subsequently collected other items from Maez's pockets which were not taken, including money, a cell phone, a cell phone battery, and a nut driver.(cd,7/2/10,pp108-112) Kelly subsequently spoke to the police, admitted running after Maez and recovering his property when Jessica yelled someone was stealing from the Oslund car, and denied assaulting Maez in any way.(cd,7/1/10,pp245-246;env.2,P.E.60)

For the reasons and authorities presented in the Amended Opening Brief, the trial court erred by refusing to give Defendant's Tendered Instructions #1 and #5.

By rejecting Defense Instructions Nos. 1 and 5 and by failing to properly instruct the jury on the affirmative defense of defense-of-property, as set forth in C.R.S. § 18-1-706, the trial court deprived Kelly Oslund of his right to acquittal on those grounds and violated his constitutional right to due process, to a fair trial, to a jury trial, to present a defense, and to have the prosecution prove every element of the charged offense beyond a reasonable doubt. *Cassels v. People*, 92 P.3d 951 (Colo.2004)(trial court committed reversible error by failing to provide defendant's requested jury instruction on provocation mitigator); *People v. Garcia*, 113 P.2d 775 (Colo.2005)(if the trial court errs in disallowing an affirmative defense, then it improperly lowers the prosecution's burden of proof, and because a defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof, such error cannot be deemed harmless); *People v.*

Dewitt, 275 P.3d 728 (Colo.App.2011)(defendant's testimony was sufficient to support instruction on affirmative defense that defendant carried a weapon for a constitutionally protected purpose).

Moreover, the district court violated Mr. Oslund's constitutional right to due process by interpreting C.R.S. § 18-1-706 in the manner that it did and applying that interpretation retroactively to Mr. Oslund. *See, e.g.*, U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Hawkins v. Mullin*, 291 F.3d 658 (10th Cir.2002); *People v. Robb*, 215 P.3d 1253 (Colo.App.2009); *Aue v. Diesslin*, 798 P.2d 436 (Colo.1990).

The error mandates reversal under any applicable standard.

II. THE DISTRICT COURT REVERSIBLY ERRED AND VIOLATED MR. OSLUND'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO JURY TRIAL, TO DUE PROCESS, AND TO A FAIR TRIAL BY INSTRUCTING THE JURY IN INSTRUCTION NO. 15, OVER OBJECTION, THAT "PROOF OF OWNERSHIP OF THE PROPERTY TAKEN FROM THE PERSON OR PRESENCE OF THE VICTIM IS IMMATERIAL SO LONG AS THE VICTIM HAD SUFFICIENT CONTROL OVER IT AT THE TIME OF TAKING" WHEN THE ALLEGED VICTIM WAS COMMITTING A THEFT-IN-PROGRESS AND THE COURT FAILED TO INSTRUCT THE JURY ON DEFENSE OF PROPERTY.

For the reasons and authorities presented in Argument II of Amended Opening Brief (AOB,pp32-37), the district court reversibly erred and violated Mr. Oslund's constitutional rights by instructing the jury in Instruction No. 15, over objection, that "proof of ownership of the property taken from the person or presence of the victim is immaterial so long as the victim had sufficient control over it at the time of taking," because the alleged victim was committing a theft-in-progress and the court failed to instruct the jury on defense-of-property. *See, e.g.*, U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 3, 16, 23, 25.

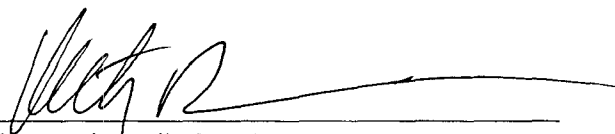
Further, by giving Instruction No. 15, the trial court compounded its prior error denying Kelly's tendered affirmative defense instructions. Indeed, together, the errors delivered a one-two punch that gutted Kelly's entire defense at trial because they barred his affirmative defense, deprived him of his theory of defense and prevented him from presenting to the jury his explanation of the evidence. *See, e.g., Brown v. People*, 239 P.3d 764, 771 (Colo.2010)(presenting the jury with

defendant's explanation of the evidence considered "integral" to his right to present a defense).

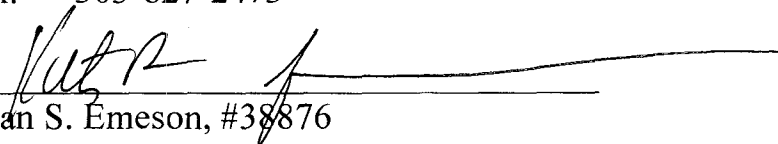
The error mandates reversal under any applicable standard.(AOB,pp32-37)

CONCLUSION

For the reasons and authorities presented herein, as well as the reasons and authorities presented in the Amended Opening Brief, Kelly Oslund requests this Court vacate his conviction for aggravated robbery and remand his case to the district court for a new trial.



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CERTIFICATE OF SERVICE

I certify that I have duly served the within **REPLY BRIEF** upon all parties herein
by depositing a copy (or copies) of same in the United States mail

this 6th day of October 2012

addressed as follows:

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