

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	DATE FILED: February 14, 2019 3:43 PM FILING ID: 7D4779C9F7141 CASE NUMBER: 2017CA2326
El Paso County District Court Honorable Jann P Dubois Case Number(s): 16CR3829	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. ADAM LOEHR Defendant-Appellant	COURT USE ONLY
Patrick R. Henson (ADC-Retained Counsel) Henson Law, LLC P.O. Box 40399 Denver, CO 80204 Phone Number: 303-718-2738 E-mail: patrick@hensonlawllc.com Atty.Reg.: #42576	Case Number 17CA2326
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

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:

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

☒ It contains 9,500 words or less. Specifically, the opening brief contains 5,418 words, not including the case caption, certificate of service page, table of contents and authorities, and this certificate of compliance page.

☒ It does not exceed 30 pages.

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☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

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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.

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/S/ Patrick Henson
Signature of Attorney of Party

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INTRODUCTION

Defendant-Appellant, Adam Loehr, was the defendant in the trial court and will be referred to by name (“Mr. Loehr”). Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution, the district attorney, or the government. The electronic record, a number of digital files, will be cited by each file’s date and page number, e.g., (TR. 3/3/17, p5). The electronic court file will be cited as follows, e.g., (CF, p44).

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court abused its discretion and reversibly erred when it allowed the government to introduce into evidence a warrant for Mr. Loehr’s arrest arising out of another case because (1) the prosecution failed to prove that Mr. Loehr knew about the warrant in the other case (2) without evidence that Mr. Loehr knew about the warrant’s existence, it was mere speculation to assert that Mr. Loehr provided police with a false name to avoid the consequences of the bench warrant and (3) the government relied extensively on the speculative warrant evidence to convict Mr. Loehr of the criminal impersonation and attempt to influence a public servant charges?

II. Whether the trial court violated Mr. Loehr’s due process rights and reversibly erred when it denied Mr. Loehr’s motion for judgment of acquittal on the criminal impersonation charge because the government failed to prove—as

required by clear precedent—that (1) the defendant gave a false name *and* (2) that use of the name would result in a benefit to the defendant?

**NATURE OF THE CASE, RELEVANT FACTS, PROCEDURAL HISTORY,
AND RULING/JUDGMENT/ORDER PRESENTED FOR REVIEW**

On or about August 2, 2016, the government, in El Paso County, Colorado, in case number 16CR3829, charged Mr. Loehr with: (count one) possession of a controlled substance¹; (count two) criminal impersonation²; (count three) false reporting to authorities³; (count four) possession of drug paraphernalia⁴ (CF, pp2-4).

On August 3, 2016, Mr. Loehr applied for the assistance of the public defender’s office (CF, p7). On that same date, the trial court appointed Alternate Defense Counsel Eric Anaya because the court found that the public defender’s office had an ethical conflict of interest (CF, p8).

On August 29, 2016, the government filed a “Motion to Amend” and an amended complaint and information wherein it sought to charge Mr. Loehr with

¹ A class four drug felony pursuant to C.R.S. § 18-18-403.5(2)(a), in violation of C.R.S. § 18-18-403.5(1).

² A class six felony pursuant to C.R.S. § 18-5-113(2), in violation of C.R.S. § 18-5-113(1)(b)(II).

³ A class three misdemeanor pursuant to C.R.S. § 18-8-111(2) (2016), in violation of C.R.S. § 18-8-111(1)(d).

⁴ A drug petty offense pursuant to C.R.S. § 18-18-428(2), in violation of C.R.S. § 18-18-428(1).

two additional counts: (count five) attempt to influence a public servant⁵; and (count six) indecent exposure⁶ (CF, pp16-20). On August 31, 2016, the court granted the government’s “Motion to Amend” (CF, pp22, 26).

On January 11, 2017, the government filed an amended complaint and information wherein it sought to charge Mr. Loehr with two additional criminal habitual counts⁷, counts seven and eight (CF, pp42-44). On March 7, 2017, the trial court approved the government’s January 11, 2017 amended complaint and information (CF, p55).

Mr. Loehr tried his case to a jury from April 25, 2017 to April 27, 2017. At the conclusion of the trial, the jury found Mr. Loehr guilty of counts one through five, but not guilty of count six—indecent exposure (TR. 4/27/17pm, pp2-3; CF, pp138-144).

On June 7, 2017, Mr. Loehr—via counsel—filed a “Motion for Proportionality Review of Defendant’s Habitual Sentence” wherein he argued that any sentence imposed pursuant to the habitual criminal statute would violate his Eighth Amendment rights under the United States Constitution (CF, pp148-51).

⁵ A class four felony pursuant to C.R.S. § 18-8-306, in violation of C.R.S. § 18-8-306.

⁶ A class one misdemeanor pursuant to C.R.S. § 18-7-302(2)(b), in violation of C.R.S. § 18-7-302(1)(b).

⁷ Sentence enhancers pursuant to C.R.S. § 18-1.3-801, in violation of C.R.S. § 18-1.3-801.

On July 14, 2017, the court held Mr. Loehr's habitual criminal trial at the conclusion of which the court adjudicated Mr. Loehr a habitual criminal (TR. 7/14/17, p39:19-25).

On August 9, 2017, the court held an abbreviated proportionality review hearing at which the court concluded that Mr. Loehr's mandatory sentence—pursuant to the habitual criminal statute—was grossly disproportionate to the underlying offenses (TR. 8/9/17, p6:10-21). The court then set the matter for an extended proportionality review hearing (TR. 8/9/17, pp6-7).

On November 3, 2017, the government and Mr. Loehr reached an agreed upon sentence of nine years of incarceration in the Department of Corrections and the court accepted and imposed the parties agreed upon sentence (TR. 11/3/17, pp3-4, 6-9).

Mr. Loehr appeals.

SUMMARY OF THE ARGUMENT

First, the trial court abused its discretion and reversibly erred when it allowed the government to introduce into evidence a warrant for Mr. Loehr's arrest arising out of another case. Indeed, the government did not—and could not—demonstrate that Mr. Loehr knew about the warrant. Instead, the government only hoped that the jury would infer that Mr. Loehr was aware of the warrant's existence.

A division of this Court, in *People v. Perry*, 68 P.3d 472, 475 (Colo. App. 2002), held that such evidence was inadmissible without first proving that the defendant knew about the warrant's existence because, to hold otherwise, would allow and encourage the jury to reach its verdict based on speculation.

Because the evidence of Mr. Loehr's warrant arising out of another case was inadmissible, and because the government relied *extensively* on the warrant evidence to convict Mr. Loehr of criminal impersonation and attempt to influence a public servant, Mr. Loehr's convictions for those counts should be reversed.

Second, the trial court violated Mr. Loehr's due process rights and reversibly erred when it denied Mr. Loehr's motion for judgment of acquittal on the criminal impersonation charge. Indeed, in order to convict Mr. Loehr of criminal impersonation, the government needed to prove both that (1) the defendant gave a false name *and* (2) that use of the name would result in a benefit to the defendant. In Mr. Loehr's case, the government could not—and did not—prove that his alleged use of false names would result in a benefit to him because multiple officers testified that, under no circumstance, was Mr. Loehr going to be released from police custody on the day of the alleged crimes due to the drug and indecent exposure allegations.

Further, Officer Scott testified that, upon learning Mr. Loehr's real name, she searched for warrants for Mr. Loehr's arrest but did not find any (TR. 4/26/17,

p112:6-11). Thus, again, the government could not—and did not—prove that Mr. Loehr would receive a benefit by providing the police with false names because no warrant appeared that he could have evaded by providing a false name.

Because the government failed to prove that, by providing false names to police, Mr. Loehr would receive a benefit, there was insufficient evidence for the jury to convict Mr. Loehr of criminal impersonation and his conviction on that count should be reversed.

ARGUMENT

I. The trial court abused its discretion and reversibly erred when it allowed the government to introduce into evidence a warrant for Mr. Loehr’s arrest arising out of another case because (1) the prosecution failed to prove that Mr. Loehr knew about the warrant in the other case (2) without evidence that Mr. Loehr knew about the warrant’s existence, it was mere speculation to assert that Mr. Loehr provided police with a false name to avoid the consequences of the bench warrant and (3) the government relied extensively on the speculative warrant evidence to convict Mr. Loehr of the criminal impersonation and attempt to influence a public servant charges.

A. Standard of Review

This issue was preserved on April 25, 2017, the first day of trial, when defense counsel objected to the government introducing, as *res gestae* evidence, a warrant—out of Washington state—for Mr. Loehr’s arrest (CF, pp11-12).

Appellate courts review evidentiary issues for an abuse of discretion. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). An abuse of discretion occurs when the trial court’s decision was manifestly arbitrary, unreasonable, or unfair.

Id. Furthermore, if an appellate court concludes that the trial court made an erroneous evidentiary ruling, it further must determine whether that evidentiary error was harmless under the nonconstitutional harmless error standard. *People v. Short*, 425 P.3d 1208, 1222 (Colo. App. 2018). “Under the nonconstitutional harmless error test, the defendant must establish a reasonable probability that the court’s error contributed to his conviction.” *Id.* (internal citations omitted). “A ‘reasonable probability’ does not mean that it is ‘more likely than not’ that the error caused the defendant’s conviction; rather, it means only a probability sufficient to undermine confidence in the outcome of the case.” *Id.* (internal citations omitted).

B. Applicable Facts

On April 25, 2017, the first day of trial, the prosecutor, court, and defense counsel engaged in the following colloquy:

[COURT]: And do the People have any in-limine?

[PROSECUTOR]: Yes, Your Honor. We intend to get into his warrant out of Washington as a motive to lie about his name for the Criminal Impersonation charge. That information has been disclosed to Defense, and I believe it’s *res gestae*.

[DEFENSE COUNSEL]: And, Your Honor, I would object to that. That just became relevant to the D.A. They ran him for warrants. There were no warrants when he was arrested.

[PROSECUTOR]: It’s not going to the officers, it’s going to his motive for lying, for Mr. Loehr’s motive for lying. And the fact that

the officers didn't know he had a warrant is irrelevant to that. It's that fact that Mr. Loehr had the warrant.

[DEFENSE COUNSEL]: And there's no indication that he knew about that, and there's no indication that the officers told him, and he wasn't arrested on that. It just became apparent to the D.A.s recently.

[PROSECUTOR]: The warrant was for failing to appear for a hearing that was set.

[COURT]: And what did he state to authorities, the false reporting?

[PROSECUTOR]: He gave the wrong name, so he continually gave a false name.

[DEFENSE COUNSEL]: At one point he called himself King Eric.

[PROSECUTOR]: Eric Holmes, King Eric, Eric Edwards, multiple different names, and never gave his real name.

[COURT]: I would agree with the People that that would be evidence in support of the defendant giving that false name. What was the reason for doing so? Because of the possibility that he could be arrested. So I would grant the People's request to delve into that.

(TR. 4/25/17, pp11-12).

Subsequently, during opening statements, the prosecutor stated to the jury "Now, intent we have to prove. How are we gonna prove that? We are gonna prove that the defendant did not want the police to know his real name because he had a warrant for his arrest out of Washington. He didn't want the police to know who he was that day." (TR. 4/25/17, p105:3-7).

During trial, numerous police officers testified that Mr. Loehr provided them with a false name (e.g. 4/26/17, pp11, 27, 34, 58, 59, 89, 95). Further, Officer

James Schenk testified that, in regards to the attempting to influence a public servant charge, “When someone gives you a fake name, a lot of times they’re trying to – when they have a warrant and they’re trying to hide from the fact they have a warrant.” (TR. 4/26/17, p26:9-26).

The government did not, however, introduce any evidence that indicated that Mr. Loehr knew about the alleged warrant for his arrest out of Washington (TR. 4/26/17, pp134-35). In fact, Officer Jennene Scott testified that, upon learning Mr. Loehr’s name, she ran his name for warrants and none were found at that time (TR. 4/26/17, p112). The government then introduced into evidence a certified copy of the warrant for Mr. Loehr’s arrest out of Skagit Count, Washington (TR. 4/26/17, pp132-33; EX trial, pp2-3).

On the last day of trial, April 27, 2017, the government made the following statements during closing arguments:

- “Attempt to Influence a Public Servant....We heard testimony that there was a warrant open and that he’s been on the lam for almost seven years. If he gave him a fake name and he was released, Eric Holmes or Eric Edwards would have to deal with it and he could flee, just like he did in Washington state.” (TR. 4/27/17, p29:4,21-25);
- “And if the officers had found an extraditable warrant, the defendant would have been held on that warrant from Washington. And let me be very clear about

this...this is not a warrant that you don't know you have. This is a warrant for an FTA...and any police conduct with that name, his real name, could subject him to that warrant. He didn't want to go back to Washington.” (TR. 4/27/17, p30:14-22);

- “Criminal Impersonation....what the officers were thinking is immaterial and irrelevant to what the defendant was thinking in that he had an open warrant and he had drugs on him.” (TR. 4/27/17, p32);
- “What’s important is that that warrant was active when they found the drugs, and when he was giving these false names to avoid prosecution in this case.” (TR. 4/27/17, p33:1-3);
- “So he gave false or fictitious identities, in particular Eric Holmes in this circumstance, because that is – under that identity he was performing that act to gain a benefit or to injury [sic] another person. So his benefit was to avoid prosecution, to avoid getting picked up on a warrant.” (TR. 4/27/17, p46:7-11);
- “[Defense counsel] said that if we don’t have the warrant, we don’t have the charges. Well, that’s simply not true, because that is an additional motivation for his actions. It’s not the only motivation, there can be many motivating factors. A warrant is just one of them. And that does prove that he tried to influence Officer Taylor....What matters is that he knew about it because he failed to appear at court, and he’s been avoiding that warrant for seven years.” (TR. 4/27/17, p51:11-20); and

- “You have to determine what the intent was, and all of the surrounding circumstances indicate that he was intending to get out of the warrant and out of these charges. And he’s absolutely guilty on all charges.” (TR. 4/27/17, p52:7-10).

Thus, the government repeatedly argued that the jury could infer that Mr. Loehr was aware of the warrant’s existence, and, therefore, Mr. Loehr was attempting to provide a false identity to avoid the consequences of that warrant. Ultimately, the jury convicted Mr. Loehr of attempt to influence a public servant and criminal impersonation based on the government’s assertion that Mr. Loehr provided a false name to avoid the consequences of the warrant issued in another case (TR. 4/27/17pm, pp2-3; CF, pp138-44).

C. Law and Analysis

C.R.S. § 18-5-113, in pertinent part, provides:

(1) A person commits criminal impersonation if he or she knowingly:

....

(b) Assumes a false or fictitious identity or capacity, legal or other, and in such identity or capacity he or she:

....

(II) Performs any other act with intent to unlawfully gain a benefit for himself, herself, or another or to injure or defraud another.

C.R.S. § 18-8-306 provides:

Any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person

or property, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by him or the agency of which he is a member, commits a class 4 felony.

C.R.E. 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

C.R.E. 402 provides that all relevant evidence should be admitted unless it is excludable by some statute or rule. C.R.E. 403 provides that relevant evidence should be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In *People v. Perry*, 68 P.3d 472, 475 (Colo. App. 2002), the defendant-appellant, Zid Perry, argued that the trial court abused its discretion and reversibly erred when it refused to allow the defense to introduce evidence of Mr. Perry's outstanding bench warrant in another case. Specifically, Mr. Perry argued that the trial court should have permitted him to introduce evidence of his outstanding warrant in the other case because such evidence would have rebutted the presumption created by the government in the current case that he fled from police because he was guilty. Mr. Perry further argued that the existence of the warrant

would have assisted the jury in assigning appropriate weight to the flight evidence and in putting the arrest itself in context.

The Colorado Court of Appeals, however, held that the trial court properly refused to allow Mr. Perry to introduce evidence of his outstanding bench warrant in another case. Specifically, the court of appeals held that “To avoid encouraging a jury to speculate, evidence must create more than an unsupported inference or a possible ground for suspicion.” *Id.* The court further stated that the “defendant sought to introduce evidence of the bench warrant’s existence as an alternative explanation for his flight. However, he proffered no evidence that he knew about the warrant; instead, he argued the jury could infer that he was aware of its existence.” *Id.*

Thus, the court of appeals concluded that the trial court properly denied Mr. Perry’s request to introduce evidence of his outstanding bench warrant in another case because “without evidence defendant knew of the warrant’s existence, it would have been mere speculation that he fled [from police] for that reason.” *Id.*

Here, just as in *People v. Perry*, evidence of Mr. Loehr’s warrant in another case was inadmissible because the government presented no evidence that Mr. Loehr knew of the warrant’s existence. Instead, the government—as in *Perry*, *supra*—introduced such evidence in the hopes that the jury would infer that Mr. Loehr was aware of the warrant’s existence.

As the court of appeals made clear in *People v. Perry*, without evidence that Mr. Loehr actually knew about the warrant in the other case, the jury would only be able to speculate as to why Mr. Loehr provided police with a false name. *Perry*, 68 P.3d at 475. Accordingly, the court should not have permitted the government to introduce evidence of the warrant because, “To avoid encouraging a jury to speculate, evidence must create more than an unsupported inference or a possible ground for suspicion.” *Id.*; *see also* C.R.E. 402-403.

Moreover, without evidence that Mr. Loehr knew about the warrant in the other case, the government could not assert that Mr. Loehr provided police officers with a false name to attempt to influence a public servant or to “gain a benefit for himself” because such an assertion—without proof of Mr. Loehr’s knowledge of the warrant—was mere speculation. C.R.S. § 18-5-113; C.R.S. § 18-8-306; *Perry*, 68 P.3d at 475; *see also* C.R.E. 402-403. Thus, the trial court’s decision to permit the government to introduce such speculative evidence was manifestly arbitrary, unreasonable and unfair. *Ibarra*, 849 P.2d at 38.

Moreover, the court’s erroneous evidentiary ruling was not harmless. Indeed, the prosecution *repeatedly* argued—during closing arguments—that Mr. Loehr was guilty of criminal impersonation and attempt to influence a public servant because, by providing a false name, Mr. Loehr was hoping that the police would not discover his outstanding warrant in another case, and thereby attempted

to influence a public servant's decision or action and assumed a false identity to "gain a benefit for himself" (TR. 4/27/17, pp29, 30, 32, 33, 45, 46, 51, 52). See C.R.S. § 18-5-113; C.R.S. § 18-8-306.

In sum, the prosecution failed to prove that Mr. Loehr knew about the warrant in the other case. Without evidence that Mr. Loehr knew about the warrant's existence, it was mere speculation as to why he provided police officers with a false name and the government could not assert that Mr. Loehr provided police officers with a false name to gain a benefit for himself or to influence a public servant's decision or action. *Perry*, 68 P.3d at 475; C.R.S. § 18-5-113; C.R.S. § 18-8-306. Thus, because the government relied extensively on the existence of the warrant—speculative evidence—to convict Mr. Loehr of criminal impersonation and attempt to influence a public servant, a reasonable probability exists that the court's erroneous evidentiary ruling contributed to Mr. Loehr's conviction." *Short*, 425 P.3d at 1222. Put another way, the trial court's erroneous evidentiary ruling sufficiently undermined confidence in the outcome of the case, warranting reversal of Mr. Loehr's convictions. *Id.*

II. The trial court violated Mr. Loehr's due process rights and reversibly erred when it denied Mr. Loehr's motion for judgment of acquittal on the criminal impersonation charge because the government failed to prove—as required by clear precedent—that (1) the defendant gave a false name *and* (2) that use of the name would result in a benefit to the defendant.

A. Standard of Review

This issue was preserved on the last day of trial, April 27, 2017, when the defendant—via counsel—made a motion for judgment of acquittal (TR. 4/27/17, pp2-3).

Appellate courts review preserved sufficiency arguments de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, was both substantial and sufficient to support the conclusion by a reasonable mind that the defendant was guilty beyond a reasonable doubt. *People v. Perez*, 367 P.3d 695, 697 (Colo. 2016). Further, because sufficiency-of-the-evidence claims raise constitutional concerns, appellate courts will reverse for any error unless it was constitutionally harmless. These errors require reversal unless the appellate court is able to declare a belief that the error was harmless beyond a reasonable doubt. *People v. Springsted*, 410 P.3d 702, 709 (Colo. App. 2016).

“The constitutional harmless error test ‘is not whether, in a trial, that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.’” *Bernal v. People*, 44 P.3d 184, 200-01 (Colo. 2002) (quoting *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998)).

B. Applicable Facts

On April 25, 2017, the first day of trial, the government called Weston Martin and Valerie Smith, who testified that they saw Mr. Loehr expose his penis

and—possibly—commit an act of masturbation in a public park (TR. 4/25/17, pp115-19, 150).

On April 26, 2017, the second day of trial, the government called Sergeant Shane Alvarez who testified that:

- he was the first officer on scene after Mr. Loehr allegedly exposed himself (TR. 4/26/17, p8:3-4);
- upon arriving on scene, he identified himself to Mr. Loehr and placed handcuffs on him (TR. 4/26/17, p10:5-9);
- he then asked Mr. Loehr his name and what was going on but Mr. Loehr did not answer him and just looked at him with a “strange...glazed over look” (TR. 4/26/17, p10:9-11);
- he then asked Mr. Loehr his name again and Mr. Loehr began whispering and he could not understand what Mr. Loehr said (TR. 4/26/17, p10:11-13);
- he then noticed that several police cars pulled up to the scene, so he asked Mr. Loehr a third time what his name was and Mr. Loehr said his name was “Eric Edwards” and he was born on “July 12, 1972” (TR. 4/26/17, p10:13-16);
- “When we got him back to the car, the other officers began running that name [Eric Edwards]. I’m not sure what they found when they were running it, but it wasn’t him. I know I was told later that he eventually had to go and get fingerprinted so we can identify him positively” (TR. 4/26/17, p11:10-14);

- Mr. Loehr subsequently voluntarily told police that he had drugs in his backpack—Mr. Loehr didn't try to hide the drugs, he just told the police he had drugs in his backpack (TR. 4/26/17, pp14-15); and
- Mr. Loehr was going to be arrested, and there was “no way” Mr. Loehr was going to talk his way out of being arrested (TR. 4/26/17, pp15, 17-19).

Next, the government called Officer James Schenk as a witness who testified that:

- upon arriving on scene, he contacted Sergeant Alvarez and saw that Mr. Loehr was handcuffed (TR. 4/26/17, p28, p8:13);
- he then took Mr. Loehr, placed him in his patrol car, patted him down, and searched his backpack (TR. 4/26/17, p28:19-22);
- when he searched the backpack, he found a baggy with crystal methamphetamine and a glass smoking pipe (TR. 4/26/17, p30:2-7);
- Mr. Loehr acted “very irrationally, bizarre, appeared to be possibly under the influence of something” (TR. 4/26/17, p34:5-6);
- Mr. Loehr said his name was Eric Edwards and he ran that name in their mobile field reporting system, and there was no match for that name (TR. 4/26/17, pp27, 34); and
- Mr. Loehr was initially placed in custody because of the indecent exposure, but was also in custody for the possession of narcotics (TR. 4/26/17, p37:8-9).

The government next called Officer John Taylor as a witness who testified that:

- he first had contact with Mr. Loehr when Mr. Loehr was in the back of Officer Schenk's police car (TR. 4/26/17, p58:6-10);
- Mr. Loehr identified himself as Eric Holmes and Eric King, with a birth date of December 7, 1972 but he could not find any records matching those names (TR. 4/26/17, p58:11-16); and
- Officer Schenk transported Mr. Loehr back to the Police Operations Center where Mr. Loehr was fingerprinted and photographed, which allowed the police to identify Mr. Adam Loehr (TR. 4/26/17, p58-59).

The government then called Officer Jennene Scott who testified that:

- she contacted Mr. Loehr in the back of Officer Schenk's police car (TR. 4/26/17, p88);
- she asked him his name and Mr. Loehr said Eric Holmes with a date of birth of July 12, 1972 (TR. 4/26/17, pp88-89);
- she asked Mr. Loehr if he had any nicknames, and Mr. Loehr said "King Eric" (TR. 4/26/17, p89:8-10);
- she decided that, because his nickname was "King Eric," his real name might be "Eric King" (TR. 4/26/17, p89:14-18);

- she later determined Mr. Loehr's real name and date of birth by taking Mr. Loehr's fingerprints and running it through local and national databases (TR. 4/26/17, p91:4-8);
- she also remembered Mr. Loehr saying that his name was Bradley King (TR. 4/26/17, p107:16-17);
- by the time she spoke with Mr. Loehr in the back of the police cruiser, he was in custody and "not going anywhere" (TR. 4/26/17, p109:2-7);
- Mr. Loehr was "not going to be able to talk his way out of going to jail" (TR. 4/26/17, p110:14-16);
- because Mr. Loehr provided five different names, it was obvious that he was not telling the truth (TR. 4/26/17, p110:20-25); and
- upon learning Mr. Loehr's real name, she searched for warrants for Mr. Loehr's arrest but did not find any (TR. 4/26/17, p112:6-11).

C. Law and Analysis

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *People v. Santana*, 255 P.3d 1126, 1130 (Colo. App. 2011) (citing *Francis v. Franklin*, 471 U.S. 307, 313 (1985)).

C.R.S. § 18-5-113, in pertinent part, provides:

(1) A person commits criminal impersonation if he or she knowingly:

....

(b) Assumes a false or fictitious identity or capacity, legal or other, and in such identity or capacity he or she:

....

(II) Performs any other act with intent to unlawfully gain a benefit for himself, herself, or another or to injure or defraud another.

In order for the government to prove that a defendant committed criminal impersonation by providing a police officer with a false name, it must prove both that the defendant gave a false name *and* “that use of the name *would* result in a benefit to defendant” (emphasis added). *People v. Johnson*, 30 P.3d 718, 721 (Colo. App. 2000); *People v. Shaw*, 616 P.2d 185, 186 (Colo. App. 1980).

Indeed, in *People v. Johnson*, 30 P.3d 718, 721 (Colo. App. 2000), a division of this Court held that:

Although some cases addressing criminal impersonation have found that the intent to defraud could be inferred from the surrounding circumstances...those cases cannot be read as standing for the proposition that criminal intent is invariably to be inferred whenever false identifying information is given to police. Indeed, in *People v. Shaw, supra*, a conviction for criminal impersonation based on the defendant’s having given a false name to an arresting officer was reversed because the prosecution had failed to present evidence that the use of the false name *would* result in a benefit to the defendant. Moreover, the finding of intent in this case was based not merely on an inference, *but on defendant’s own testimony that he gave a false name to the arresting officer to avoid going to jail.*

(emphasis added).

Here, there was no testimony from the defendant, or anyone else, that established that Mr. Loehr would have received a benefit by providing officers with a false name. Indeed, the testimony indicated that (1) Mr. Loehr provided at least five different names to police officers (2) Mr. Loehr acted “very irrationally, bizarre, appeared to be possibly under the influence of something” (TR. 4/26/17, p34:5-6) and (3) because Mr. Loehr provided five different names, it was obvious that he was not telling the truth (TR. 4/26/17, p110:20-25). Most importantly, multiple officers testified that, under no circumstance, was Mr. Loehr going to be released from police custody that day due to the drug and indecent exposure allegations (TR. 4/26/17, pp15, 17-19, 37, 110).

Thus, the evidence failed to demonstrate that the false names Mr. Loehr provided to police officers “would result in a benefit to the defendant.” *Johnson*, 30 P.3d at 721; *Shaw*, 616 P.2d at 186. Indeed, because Mr. Loehr was going to be arrested and detained on the drug and indecent exposure allegations, the government could not—and did not—prove that Mr. Loehr would receive a benefit by providing the police with false names. *Shaw*, 616 P.2d at 186 (conviction for criminal impersonation based on the defendant’s having given a false name to an arresting officer was reversed because the prosecution had failed to present evidence that the use of the false name *would* result in a benefit to the defendant); *Johnson*, 30 P.3d 721 (affirming *Shaw* and distinguishing based on defendant’s

own testimony that he gave a false name to the arresting officer to avoid going to jail).

Moreover, Officer Scott testified that, upon learning Mr. Loehr's real name, she searched for warrants for Mr. Loehr's arrest but did not find any (TR. 4/26/17, p112:6-11). Thus, again, the government could not—and did not—prove that Mr. Loehr would receive a benefit by providing the police with false names because no warrant appeared for which Mr. Loehr could have been arrested. *Johnson*, 30 P.3d 721; *Shaw*, 616 P.2d at 186. Simply put, Mr. Loehr could not have received the benefit of evading a warrant if the warrant did not appear in the police databases for determining whether outstanding warrants existed. Additionally, the warrant evidence was inadmissible because the government could not prove that Mr. Loehr had any knowledge of the warrant (see Argument I, *supra*).

Because—pursuant to *Johnson and Shaw, supra*—the government failed to prove that, by providing false names to police, Mr. Loehr would receive a benefit, there was insufficient evidence for the jury to convict Mr. Loehr of criminal impersonation. C.R.S. § 18-5-113. Mr. Loehr, therefore, respectfully requests that this Court reverse his criminal impersonation conviction. *Springsted*, 410 P.3d at 709.

CONCLUSION

For the reasons and authorities presented in Argument I above, Mr. Loehr respectfully requests that this Court reverse his criminal impersonation and attempt to influence a public servant convictions. For the reasons and authorities presented in Argument II above, Mr. Loehr respectfully requests that this Court reverse his criminal impersonation conviction.

Respectfully submitted,

/s/ Patrick R. Henson
Patrick R. Henson

CERTIFICATE OF SERVICE

I certify that I have duly served the within OPENING BRIEF upon all parties below via the Integrated Colorado Courts E-Filing System (ICCES) and/or via regular U.S. mail service on this 14th day of February, 2019.

Colorado Department of Law
Appellate Division
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203

/s/ Patrick R. Henson
Bar no. 42576