

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203</p>	
<p>Arapahoe District Court Honorable JOHN LEOPOLD Case Number 99CR2428</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>ANTHONY SHAPIRO</p> <p>Defendant-Appellant</p>	<p>▲ COURT USE ONLY ▲</p>
<p>David S. Kaplan, Colorado State Public Defender KATHLEEN A. LORD, #14190 110 16th Street, Suite 800 Denver, Colorado 80202</p> <p>Appellate.defenders@state.co.us (303) 620-4888 (Telephone)</p>	<p>Case Number: 01CA19</p>
<p style="text-align: center;">OPENING BRIEF</p>	

STATEMENT OF THE ISSUES PRESENTED

1. Was Mr. Shapiro's right of confrontation violated by the trial court's erroneous admission of Patrick Tretter's inadmissible and unreliable hearsay statements to police?
2. Did the prosecution's pretrial threats to file charges against two defense witnesses deprive Mr. Shapiro of his right to compulsory process and to present a defense?
3. Did the trial court err when it allowed the prosecution to use the co-defendant's guilty plea to accessory to *first degree murder* as substantive evidence against Mr. Shapiro?
4. Did the trial court commit reversible error and violate CRE 404(b) when it admitted evidence of an unrelated 1991 stabbing for the "limited" purpose of establishing motive, modus operandi, intent, plan and preparation?
5. Was Mr. Shapiro's right to a reliable determination of his guilt or innocence violated by the admission of inflammatory, unnecessary and misleading photographs?
6. Did the trial court err when it refused to dismiss a juror after the juror became ill and required assistance upon viewing an extremely graphic autopsy photograph?
7. Did the trial court erroneously instruct the jury on self-defense?
8. Did the cumulative effect of error deprive Mr. Shapiro of a fair trial?

STATEMENT OF THE CASE¹

On September 16, 1999, the State charged Mr. Shapiro by Information with first degree murder, a class one felony in violation of §18-3-102(1)(a), 6 C.R.S. (1999) (v1 p33-40). After a jury trial held November of 2000, Mr. Shapiro was found guilty of the charge and sentenced to life without possibility of parole (v1 p443, 459-60; v23 p6). A timely notice of appeal was filed on January 2, 2001, thus perfecting jurisdiction in this Court (v2 p477).

¹ Throughout this brief, numbers in parentheses refer to the volume and page number of the record on appeal. There are three volumes I and three volumes II; these have been distinguished by new labels and are cited to as "v1, v1B and v1C" and "v2, v2B and v2C."

STATEMENT OF THE FACTS

In the early morning hours of September 9, 1999, Patrick Tretter's body was discovered lying on a bike path behind Hinkley High School in Aurora (v2-C p81-83). Tretter had died from loss of blood due to multiple stab wounds (v19 p68-69). The defense conceded at trial that Anthony Shapiro killed Tretter but asserted that he acted in self-defense and defense of others.

Tretter ("Pat") was the ex-husband of Brenda Gregg ("Brenda") and was a childhood friend of Anthony ("Tony") Shapiro's (v20 p184, 189-90). Brenda met Pat in 1990. They married and became the parents of twins in 1991 (v20 p172-73). In 1997, Brenda left Pat after he punched her in the face and knocked out her front tooth; she was tired of being abused, beaten and threatened when Pat was drinking (v21 p202; v22 p105). In September of 1999, Brenda and Tony were engaged and living together (v20 p182-83; v21 p18).

At the time of his death, Pat was very troubled. He was obsessed with his ex-wife, Tony and the twins (v16 p148; v20 p193). It was commonplace for Pat to call Brenda or her mother or Tony or Tony's mother and threaten to harm them, himself or his children (v2-C p175,177; v21 p191; Exh.s 109, H-B, H-C).

In April of 1998, because of Pat's constant threats, slashing of tires and other harassment, Brenda obtained a restraining order (v20 p175-78). However, the very day the restraining order was served, Pat violated it by pouring paint thinner on Brenda's car and placing a single black rose on the windshield for her to see (v20 p177; v21 p206; v22 p12).

In the weeks leading up to his death, Pat left many voice mail messages on Brenda's phone at work (v21 p86; Exh.D; Exh.109). These taped messages show a volatile man. One who was sometimes hostile, homicidal and threatening, and, other times, self-pitying or suicidal, and, sometimes, seemingly rationale (Exh. 109). Both Brenda and her mother testified they were frightened by Pat's threats and his constantly changing personality (v16 p147; v22 28-29). Brenda testified both that she was always worried and fearful Pat would act on his threats and

that she was quite never sure whether to take his threats seriously (v22 p30-32). Pat's threats included threats that Tony would not live to see the millenium; threats that Pat would kill himself and Brenda, leaving their children orphans; threats that Pat would bomb Tony's mother's home; and threats to take the children so that Brenda and her mother would never see them again (Exh. 109; v22 p32-34). Pat told Brenda that he was not afraid of going to jail and that the police could not keep him locked up forever (Exh.109; Exh.D p3; v22 p19, 36). Brenda saved several of Pat's voice messages in case anything were to happen to her children or to her, Tony, or their families (v21 p159; v22 p21, 83).

Keeping in mind that the recorded messages reflect only a fraction of Pat's threats and no actual conversations between Pat and Brenda or Tony or their family members, one is disheartened by their repetitiveness, contents and tone. After listening to these messages, one is left with the undeniable impression that Tretter was a walking time bomb, one who might go off at any time in a homicidal and/or suicidal flurry (Exh.D; Exh.109). It was undisputed that Pat's threats and harassment bothered Tony a great deal. Tony was especially disturbed by Pat's threats to Brenda and to Tony's mother Juanita Vicory (v21 p181). A few months before Pat's death, Pat threatened to do something to Tony's mother and Tony went over to his mother's house to protect her, but Pat never showed up (v21 p181). It was against the backdrop of Pat's persistent and threatening behavior that the events of September 8th occurred.

September 8, 1999 was a normal day for Brenda and Tony. Brenda left work early for a dental appointment and Tony worked the lunch shift at Papa Johns (v20 p190-92, 197). The two arranged for a babysitter so that they could go to their regular Wednesday night bowling league (v16 p64). Bowling began as usual, and Tony was in good spirits (v17 p85; v20 p47).

The mood and the night changed drastically when Brenda was called by her teenaged babysitter and told that Pat, from whom Brenda had deliberately hidden where she lived, had called several times and was threatening to come over to the house (v20 p193-94, 200-01; v21

p193-95; v22 p23). Pat also called Brenda's mother, and he sounded so disturbed and angry that she was worried for the twins' safety and felt it necessary to warn Brenda about Pat (v16 p158).

When Tony and Brenda learned about the calls, they became extremely upset; Tony said that Pat had been stalking them and that he needed to go home to protect his family (v20 p35,50). Brenda was crying and very worried about the children (v20 p42-43). The two left the bowling alley and drove to the bus stop near their home. They waited there since Pat had no car and would travel by bus, if he came. Although, in one of Pat's many calls to the babysitter that night, he told her that he would not come to the house, Brenda was concerned that Pat was just trying to get them to let down their guard and that he was still planning to come over (v20 p200; v22 p40).

Brenda and Tony sat at the bus stop in Tony's car for about 30-45 minutes and discussed the intolerable situation with Pat and his threats (v20 p203-04). Tony was upset and angry. According to Brenda, they ultimately decided that Tony would get a knife from his job at Papa Johns and that she would call Pat to arrange a meeting that night (v20 p205, 208). Brenda's stories varied. Sometimes she indicated that the two planned only to confront Pat that night and, at other times, she claimed they had planned to kill him (v20 p208; v21 p120-21; v22 p45,50). Brenda admitted that she felt as if she was at "the end of her rope" that night (v22 p39). Pat had been threatening them for so long, and she was afraid he would hurt their children (v22 p39).

At trial, Brenda was equivocal as to the number and nature of Pat's threats that she actually shared with Tony, but she admitted that she may have told Tony about Pat's threats to do serious harm by September 9, 1999 (v22 p35,41-42). Pat had told Brenda that he was "going to f--- you, f--- your family by September 9th, 1999" and "once the 9th comes around, Tony's not going to like what I've got planned for him. Your lives are going to come to hell before the 9th." (v21 p163). In addition, a couple of weeks before Pat's death, Pat told Brenda that he would be dead on September 9th and that Tony would be in jail for the rest of his life (v23 p29-30).

Brenda testified that when she called Pat that night, he was reluctant to meet with her so

she told him that things could not “continue the way that they had been,” and he then agreed to meet that night (v20 p208). Before the meeting, Brenda drove Tony to Papa Johns where he took a large knife (v21 p21). The two drove around looking for a secluded place and settled on a portion of the Highland Canal Trail behind Hinkley High School (v21 p28-30). Brenda dropped Tony off by the trail and picked Pat up (v21 p30-33). Brenda drove Pat to the high school and walked with him to the trail (v22 p34-5). According to Brenda, Tony came out quickly; he was unclothed and had the knife (v21 p42). Pat asked what was going on, and Tony said he had been waiting a long time to do this and stabbed Pat in the chest (v21 p35-36; v22 p78). Brenda was not certain whether Pat had swung at Tony (v22 p57). Brenda testified that Tony asked her to help but she could not and ran back to the car (v21 p36). After a few minutes, Brenda called for Tony to leave and saw him standing over Pat, still stabbing him (v21 p44).

After this, Brenda drove Tony to his mother’s house where he asked his mother to provide him an alibi, but she refused (v21 p52, 55-56). Brenda drove to the Platte River where she said Tony got out and buried the knife (v21 p55). According to Brenda, the two discussed getting rid of the evidence and came up with a story to tell authorities (v21 p56). In an effort to create an alibi of sorts for herself, Brenda left a voice message for Pat on his phone after he was killed. Brenda dropped Tony off at his car and she drove the babysitter home. Tony tried to return to the body to eliminate evidence, but could not locate the site. Brenda directed Tony by phone to the spot (v21 p60-62). Later that night, after Tony had returned home, Brenda noticed scratches on his face and body. She suggested they tell authorities that they had fought and that she was responsible for the scratches (v21 p72-73).

Tony was arrested on September 9th. Brenda was not immediately arrested. She was questioned twice in September and told police that she and Tony were not involved in Pat’s death. Brenda moved to Texas in October and was arrested there the following June (v21 p105-6). Brenda negotiated a plea agreement whereby she would fully cooperate with the government

and testify against Tony. In exchange she would be allowed to plead guilty to accessory, a class 4 felony. The State agreed that she could argue for probation or community corrections and would be sentenced to no more than six years in prison (v2 p367-8; v21 p113).

SUMMARY OF THE ARGUMENT

1. Mr. Shapiro's right of confrontation was violated by the trial court's erroneous admission of Patrick Tretter's unreliable statements to police.

2. Immediately before trial, the State improperly threatened defense witnesses with the possibility of prosecution. These threats, which the prosecution never carried out, resulted in the witnesses' assertion of their Fifth Amendment privilege and violated Mr. Shapiro's right to compulsory process, right to present a defense, and right to a fair trial.

3. The trial court erred when it allowed the State, over objection, to introduce evidence of co-defendant Brenda Gregg's guilty plea to "accessory after the fact *to first degree murder*" when the offense to which she pleaded is "accessory to a crime." The court's ruling permitted the State to make improper use of Gregg's plea as substantive evidence that Mr. Shapiro committed *first degree murder*.

4. The trial court erred in admitting evidence of an unrelated 1991 stabbing for the "limited" purpose of establishing motive, modus operandi, intent, plan and preparation. This evidence was inadmissible under CRE 404(b), since it was irrelevant propensity evidence. The erroneous admission of this unrelated 1991 assault violated Mr. Shapiro's right to a fair determination of his guilt or innocence as to the charged offense.

5. Mr. Shapiro's right to a reliable determination of his guilt or innocence was also violated by the admission of inflammatory, unnecessary and misleading photographs. One photograph was misleading to the extent it portrayed Patrick Tretter as a loving family man. The other photograph, which was cumulative to a less graphic photograph, was so inflammatory and graphic that it made a juror physically ill and required the court to halt the proceedings.

6. The trial court erred when it refused to excuse the juror who became ill and was comforted by another juror after having a strong reaction to a graphic autopsy photograph.

7. The trial court erroneously instructed the jury on the affirmative defense of self-defense in a way that improperly lessened the State's burden of proof.

8. The cumulative effect of error deprived Mr. Shapiro of his right to a fair trial.

ARGUMENT

I. Shapiro's Right Of Confrontation Was Violated By The Trial Court's Erroneous Admission Of Patrick Tretter's Unreliable Hearsay.

Under both the state and federal constitutions, a criminal defendant has a right to confront the witnesses against him. *E.g., Blecha v. People*, 962 P.2d 931 (Colo. 1998); *People v. Merritt*, 842 P.2d 162 (Colo. 1992). The right to confront adverse witnesses is an essential requirement of a defendant's due process right to a fair trial. *Pointer v. Texas*, 380 U.S. 400 (1965); U.S. Const., Amends. V, VI, XIV; Colo. Const., Art. II, §§ 16, 25. In addition, the right to cross-examine an adverse witness is "an integral part of the constitutionally guaranteed right to counsel." *People v. Pate*, 625 P.2d 369, 370 (Colo. 1981).

Here, the trial court committed reversible constitutional error when, over objection, it: 1) allowed a police officer to read Tretter's hearsay statements to police that Shapiro had instigated a fight with Tretter; and 2) admitted some hearsay contents of Tretter's diary.

a. Patrick Tretter's May 1999 Statements to Police

1. The Statements and Court Ruling.

Four months before the charged offense, Tretter and Shapiro fought outside a movie theater where Tretter worked (v1 p123; v20 p139 et seq.). That same day, Tretter spoke to a police officer who wrote down Tretter's statement (v20 p164-65). In the statement, Tretter blamed Shapiro for starting the fight, claimed Shapiro "cold-cocked" him, accused Shapiro of threatening him "more times" and repeatedly using "bad words," and indicated that he did not

respect Shapiro for “doing this” when the twins were present (v20 p165-66; Exh. H-3). The court permitted the officer to read the following statement by Tretter to the jury:

Wife came to pick up my children from work. She showed up with her boyfriend. I have known this guy for 15 years. I had some words with him about the concern of my children. He started to cuss me out. He started towards me and I pushed him away. Then he cold-cocked me. He just kept saying bad words. I’ve told my wife not to bring him around me. He has threatened me more times. I do not respect him at all for doing this when my kids are with me. (v20 p165-66).

The officer also testified that Tretter later asked him not to issue a ticket (v20 p166).

The defense objected to the admission of the above statement and to Tretter’s subsequent statement asking the police not to pursue charges against Shapiro (v1 p122,188; v20 p152-43). The defense argued that these statements were inadmissible hearsay and that their admission would violate Shapiro’s constitutional right to confrontation (v11 p12; v20 p82-3, 87).

The admissibility of Tretter’s statements to police was litigated before trial, but the court deferred ruling (v1 p142; v2 328; v13 p36). At trial, the State sought to admit Tretter’s statements under CRE 807, the residual exception to the hearsay rule hearsay (v20 p84-6). In ruling that the hearsay was admissible, the court failed to make any findings regarding the statements’ reliability except to find that Tretter’s written statement was “offered as to evidence of a material fact ... the intent of the defendant”, and that the statement “is more probative on [that] point than other evidence which can be procured and the general purposes of the rules are satisfied....” (v20 p88-9, 152). The court’s ruling is reversible error since Tretter’s hearsay was inadmissible under CRE 807 and its admission violated Shapiro’s rights under the Confrontation Clause.

2. Tretter’s Statements to Police Were Inadmissible Under Controlling Law.

Hearsay, *i.e.*, an out of court statement offered for the truth of the matter asserted, is inadmissible unless an exception to the rule against hearsay applies. *See* CRE 801; CRE 802. The only exception advanced for the admission of Tretter’s statements to police was the residual

exception in CRE 807. For hearsay to be admissible under the residual exception, the proponent is required to establish the following five factors: “[1] the statement is supported by circumstantial guarantees of trustworthiness; [2] the statement is offered as evidence of material facts; [3] the statement is more probative on the points for which it is offered than any other evidence which could be reasonably procured; [4] the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and [5] the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence.” *People v. Fuller*, 788 P.2d 741, 744 (Colo. 1990). The requirement that findings be made as to all five factors stems from the recognized interest in limiting the application of the residual exception to the hearsay rule. *Id.*

The trial court’s analysis of Tretter’s statements to police completely overlooked the constitutional and evidentiary requirement that residual hearsay possess particularized guarantees of trustworthiness. Tretter’s statement to police that Shapiro had started the fight in May of 1999 lacked any guaranty of trustworthiness. Statements to police, especially those in which a declarant shifts blame from himself to another, as Tretter did, are traditionally viewed with suspicion. *See, e.g., Lilly v. Virginia*, 527 U.S. 116 (1999); *accord Bernal v. People*, 44 P.3d 184 (Colo. 2002)(“arrest statements by a co-defendant have traditionally been viewed with special suspicion”), *quoting Lee v. Illinois*, 476 U.S. 530, 541 (1986); *People v. Stephenson*, 56 P.3d 1112, 1117 (Colo. App. 2002); *People v. Smith*, 790 P.2d 862, 865 (Colo. App. 1989) (“codefendant’s statement which implicates the defendant in the crime is presumptively unreliable because such a statement may be the product of a codefendant’s desire to shift or spread blame, curry favor, or to divert attention to another.”).

Because Tretter’s statements lack “circumstantial guarantees of trustworthiness,” they were inadmissible under CRE 807. *See Fuller, supra*. The admission of these also statements violated Shapiro’s right to confront adverse witnesses. The admission of hearsay violates the

Confrontation Clause unless the declarant is unavailable and the statement “bears adequate ‘indicia of reliability.’” *Id.*, 788 P.2d at 478, quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *see also People v. Dement*, 661 P.2d 675, 680-81 (Colo. 1983). The requisite reliability may be presumed if the hearsay falls within a firmly rooted hearsay exception, but if the hearsay does not, there must be a showing of particularized guarantees of trustworthiness. *Fuller, supra*.

In examining the trustworthiness of statements, courts should examine the nature and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement and the circumstances under which the statement was made. *E.g., Stevens v. People*, 29 P.3d 305 (Colo. 2001); *People v. Newton*, 966 P.2d 563 (Colo. 1998); *Fuller, supra* at 745. Tretter’s statements do not meet this basic requirement of reliability and trustworthiness. It is undisputed that Tretter disliked Shapiro and was jealous of Shapiro’s relationship with Gregg and with his children. The statements Tretter made were made after police had been summoned to a possible assault where it was unclear who initiated the confrontation. Tretter made his statements to police under circumstances where he would incriminate himself if he admitted starting the physical confrontation.

Moreover, Tretter’s statement that Shapiro was the initial aggressor was contradicted by eyewitnesses. Alex Valdez observed Tretter and Shapiro exchange blows (v20 p140, 157). Contrary to Tretter’s allegation, Valdez did not see anyone “cold-cocked,” and Valdez saw Shapiro walk away, only to be followed by Tretter angrily yelling vulgarities (v20 p144,159-61). Brenda Gregg also saw the fight and testified that Tretter got angry when Shapiro put his arm around Gregg and Tretter’s son; Gregg tried to get between the two men and was shoved by Tretter; she saw Tretter first push Shapiro, who then punched Tretter (v20 p186-188; v22 p27).

Under these circumstances, Tretter’s statements to police lack any guarantee of the trustworthiness and, thus, the admission of his statements violated both CRE 807 and the Confrontation Clause. *See, e.g., Fuller, supra; Stephenson, supra*.

The prejudice inherent in the erroneous admission of Tretter's hearsay was exacerbated by the prosecution's improper questioning. Although the court sustained a defense objection to the prosecutor's question as to whom police had planned to arrest for the May 1999 incident, it was clear from the prosecutor's mere asking of the question combined with the admission of Tretter's statement asking that charges not be filed that the answer would have been Shapiro. The fact that police may have planned to arrest Shapiro and not Tretter as a result of the May 1999 incident was obviously inadmissible under CRE 401-403. The inference created by the State that the police believed Shapiro, rather than Tretter, should be arrested, was based wholly on inadmissible hearsay. It was also inadmissible opinion testimony as to Tretter's credibility and was prejudicial to a fair determination of the charge against Shapiro.

b. Undated Diary Entry

1. The Diary and Court Ruling.

The police found a small black notebook or diary by Tretter's body (v2-C p86). In this undated diary, Tretter had written that he would never divorce Gregg, that she and their children would always be in his prayers. He wrote that he was not crazy, that he had lost everything he cared about and that he would always love Gregg and the twins (Exh. H-1).

Before trial, the prosecution provided notice of its intent to introduce the hearsay in the diary (v1 p288, v2 p328 ¶1). After a pretrial hearing on the diary's admissibility, the court ruled that there was "far too much [in the journal] that is inappropriate" and that the diary itself would not be admitted. Even so, the court ruled that the prosecution could introduce evidence that the diary "in general terms references his undying love for Gregg" (v13 p69-71). In opening statement, the prosecutor told jurors about Tretter's expressions of love for Gregg in the journal (v2-C p59). At trial, however, the court revisited its pre-trial ruling and limited trial testimony to a general statement that the notebook "referred to Tretter's life, children and Brenda Gregg" (v17 p109-112; v18 p11).

During deliberations the jury sent the court a note stating, “WE WANT TO SEE THE SMALL BLACK BOOK.” The court responded by telling the jury that it could not grant the jury’s request as the book was not admitted as evidence (v2 p447).

2. The Contents of Tretter’s Diary Were Inadmissible Under Controlling Law.

For all the reasons set forth in Section a (2) at pp. 8-10, *supra*, the contents of Tretter’s diary were erroneously admitted under the residual hearsay exception, and the admission of this hearsay violated Shapiro’s rights under the Confrontation Clauses of the state and federal constitutions. *See, e.g., Fuller, supra.* The court failed to make any findings that would support the admissibility of the diary’s contents (v17 p109-12). In fact, the court’s findings that “we have no idea when these things were written. We have no idea what his state of mind was” undermine the reliability and trustworthiness required to admit hearsay under the residual hearsay exception and/or the Confrontation Clauses.

The journal contents were also inadmissible for lack of foundation and under CRE 401-403, as it was unclear when Tretter wrote the passages, although it appeared they were written sometime before his divorce from Gregg in 1998 (v9 p127; v13 p70-71; v17 p109-12). In this case, where the court excluded evidence of Tretter’s pre-1999 threats to Shapiro and Gregg and their families on the ground such threats were too “remote,” (v13 p82), it was fundamentally unfair to allow evidence of Tretter’s professed love, i.e., non-threatening expressions, from the very period the court deemed too “remote” to support the admission of evidence of Tretter’s threats (v16 p150-53, 171-72). Moreover, expressions of love by volatile personalities like Tretter have little if any relevance to actual feelings as they are inherently ambiguous, since such expressions of love often proceed or accompany violence. While Tretter often professed his love for Brenda Gregg, he also beat her, knocked her front tooth out, and made unloving claims that he would kill her and make their children orphans and that if he could not have her, no one would (v21 p182; v22 p107; Exh. 109).

II. The State's Unwarranted Pretrial Threats to Prosecute Defense Witnesses Deprived Shapiro of His Right to Compulsory Process and to Present a Defense.

The right of an accused to present evidence in his defense is a fundamental component of due process of law. U.S. Const., amend. VI, XIV; Colo. Const. art. II, §§ 16, 25; *Taylor v. Illinois*, 484 U.S. 400 (1988); *People v. Pratt*, 759 P.2d 676 (Colo. 1988); *People v. Bell*, 809 P.2d 1026, 1029 (Colo. App. 1990). The exclusion of defense evidence undermines the central truthseeking aim of our criminal justice system because it distorts the evidence at the risk of misleading the jury into wrongly convicting an accused. *Bell, supra*. This central truthseeking aim of a criminal trial was thwarted in Shapiro's case by the unchecked exercise of the State's power. Specifically, more than a year after the date of the charged offense, at the start of trial, the prosecution threatened two defense witnesses with the possibility of criminal charges and, thus, improperly suppressed defense evidence. Despite the prosecution's pre-trial threats, which caused both witnesses to assert their right under the Fifth Amendment not to testify, the prosecution never filed any charges, a fact which casts substantial doubt on the prosecution's motives in threatening the two defense witnesses.

The Sixth Amendment guarantees a defendant the right to compel the attendance of witnesses at trial on his behalf. *Washington v. Texas*, 388 U.S. 14, 19 (1969). "This right is a fundamental element of due process of law." *Id.*; see also *United States v. Goodwin*, 625 F.2d 693, 603 (5th Cir. 1980) (holding that substantial governmental interference with a defense witness's free and unhampered choice to testify violates defendant's Fifth Amendment due process rights and requires reversal). In this case, the State's pretrial threats to charge defense witnesses with crimes constituted substantial interference with Shapiro's due process and Sixth Amendment rights to present a defense and to call witnesses.

Here, Shapiro's mother, Juanita Vicory, and his brother, Steven Vicory, were both witnesses to, and recipients of, numerous threats by Tretter, as well as witnesses to Shapiro's longstanding concerns over Tretter's threats and behavior (v9 p48-68, 146,152-65; Exh. H-B).

Tretter left many recorded voice mail messages on Mrs. Vicory's telephone. Just by way of example, these threats included threats by Tretter that he did not care if charges were pressed against him, threats to kill himself, unspecified threats of harm to Shapiro, threats to harm Shapiro "so bad to where you can't afford the hospital bills," a statement that "bitch I'm gonna, you gonna f--- with me, you're gonna f--- with my kids, I'm gonna f--- with you and I'm gonna f--- with your son, you ain't seen ... the end a' me until you kill me or he kills me or she kills me or he f---in don't," and threats that the Vickorys' security system would be of no help and that he was going to destroy their lives (Exh. H-B).

In addition, Mrs. Vicory was at the bowling alley with Shapiro and Gregg on the night of September 8, 1999, when they learned that Tretter was threatening to come over to their home (v20 p201). Both Vicorys saw Shapiro soon after Tretter was killed (v21 p51). Thus, Shapiro's mother and brother were witnesses to his state of mind the night of the charged offense and to his reaction to Tretter's latest threats. Mrs. Vicory was also a witness to Tretter's physical abuse of Brenda Gregg as Gregg had stayed with her on occasions after Tretter had choked her and beaten her up and to his character for violence² (v9 p167). In sum, Juanita and Steven Vicory were important witnesses for the defense.

Both Juanita and Steven Vicory testified without incident at a pretrial hearing on the admissibility of Tretter's hearsay (v8). The prosecution withdrew its pretrial request to admit Tretter's hearsay through these two witnesses, but acknowledged that the defense intended to call both witnesses at trial (v8 p5; v2 p328). However, on the morning of trial when Juanita and Steven Vicory appeared on their subpoenas, the prosecution told them that the State was considering filing charges of accessory to first degree murder or perjury against them (v17 p71; v21 p6-7).

² Although the court at the State's request, initially excluded evidence that Tretter abused Brenda Gregg, it allowed some evidence of this physical abuse after the State "opened the door" by eliciting Tretter's self-serving hearsay statement that he would "never hurt Brenda" (v16 p94-7).

The Vicorys' lawyer, after speaking with the prosecutors and defense, told the court that he was "not convinced that the prosecution has any basis for either of those charges," and that his clients wanted to testify for the defense at trial (v17 p71). Nevertheless, the lawyer asked for an opportunity to review discovery so that he might better advise his clients as to the risks of testifying (v17 p72). The prosecutor, in discussing the availability of discovery, told the court that the Vicorys' lawyer would need to pay for discovery and also stated:

Obviously any investigation regarding the Vicorys is a separate matter and I'm not saying that that is even separate and apart from [Shapiro's] case. I think everything we've got regarding them involves this case, but I can tell the Court that obviously there are issues of false reporting, misdemeanor issues,³] that are clear and absolute and that's I don't think there's any question about that and that's obvious from the discovery, but as to any independent basis upon which to charge them with perhaps accessory to first degree murder other than Gregg, we're invested in this case right now and that investigation would be secondary and there is no separate paperwork on that. (v17 p74)

The prosecutor thus implied that the Vicorys were the targets of an ongoing investigation that was "secondary" to the case at hand and, therefore, not separate. The court stated that it could not order the prosecution "to disclose an ongoing investigation," and, in this way, gave credence to the possibility that the prosecution would file charges (v17 p75).

After reviewing the discovery, the Vicorys' lawyer informed the court that, although the evidence against his clients was "exceedingly thin," he had advised his clients to assert their privilege against self-incrimination in large part because "the safest thing for them to do is to refuse to testify based on their Fifth Amendment privilege against self-incrimination and I have

³ The alleged "false reporting, misdemeanor issues" referenced by the prosecutor appear to relate to evidence that Shapiro asked his mother to provide him with an alibi for the night of the stabbing (v21 p52-56). The undisputed evidence, however, is that Mrs. Vicory told her son that she could not do this (v21 p55-6). Thus, there is no evidence of false reporting by either Mrs. Vicory or Steven Vicory. In addition, the statute of limitations for misdemeanors is one-year and had more than likely expired by the time of Shapiro's trial. See §16-5-401, 6 C.R.S. (2002).

explained to them what the necessity of fighting a case like that, whether the prosecution would be successful or not, might entail (v21 p5). Thus, the prosecution's threats prevented the defense from presenting Juanita and Steven Vicory's exculpatory testimony. There are many reasons why the State's motives in "advising" these defense witnesses of possible charges are suspect.

First, the prosecution did not advise the witnesses of possible charges before the pre-trial hearsay hearing but threatened charges only after it was clear that the Vicorys' testimony would be favorable to the accused.

Second, and perhaps most significantly, the prosecution, to date, has never brought any charges against Juanita or Steven Vicory.⁴

Third, the prosecution has no duty to advise people who are not in custody of possible charges or of their privilege against self-incrimination. *United States v. Morrison*, 535 F.2d 223, 228 (3rd Cir. 1976); *see also* ABA Standards, Prosecution Function, Std. 3-3.2(b) (although a prosecutor should advise a witness of his or her rights against self-incrimination and to counsel "whenever the law so requires," prosecutor "should not so advise a witness for the purpose of influencing the witness in favor of or against testifying."); *see also* C.B.A. *Formal Opinion No. 65* ("It is unethical conduct for an attorney or his representative to advise or imply to a potential witness that he should not submit to a pre-trial interview by opposing counsel"). Thus, the prosecution's decision to advise the Vicorys that it was considering filing charges against them, in a way that results in the State's unfair strategic advantage in a criminal trial and the elimination of defense witnesses should be viewed with suspicion.

Finally, the timing of the State's threat of possible prosecution could not be more calculated to disadvantage the accused. The charge against Shapiro had been pending for over a year when the prosecution first threatened the Vicorys with possible prosecution. Assuming

⁴ This Court may take judicial notice of this fact, since reference to GGCC/ICON establishes that no charges have been filed by the Arapahoe County District Attorney against these witnesses.

solely for the sake of argument that the prosecution acted properly in threatening the Vicorys with possible charges, there was nothing that prevented the prosecution from “advising” the witnesses of possible charges before the morning of trial. Timely notice of threatened charges would have allowed for a more orderly consideration of the issue by the parties and the court.

Substantial governmental interference with Shapiro’s due process and Sixth Amendment right to call witnesses in his defense constitutes reversible error. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972) (witness intimidated by judge’s overzealous advisement regarding consequences of perjury); *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980) (allegations that prison official threatened witness with transfer to a less desirable facility if he testified for defense; “Threats against witnesses are intolerable. Substantial government interference with a defense witness’ free and unhampered choice to testify violates due process rights of the defendant.”); *United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) (reversal required where State’s plea agreement with witness/codefendant precluded testifying); *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979)(reversal required where witness discouraged from testifying by threat of “trouble” in pending case); *United States v. Morrison*, 535 F.2d 223 (3d Cir.1976) (reversal required where prosecutor intimidated witness by advising her of potential charges, including perjury); *United States v. Aguilar*, 90 F.Supp.2d 1152 (D.Colo. 2000) (where the substance of what the prosecutor communicates to the witness is “a threat over and above what the record indicate[s] was timely, necessary and appropriate,” the inference that the prosecutor sought to coerce a witness is strong), quoting *United States v. Simmons*, 70 F.2d 365, 369 (D.C. Cir. 1982).

In a case very like Shapiro’s, a defendant’s murder conviction was reversed where the testimony of a defense witness in a self-defense case was suppressed as a result of the prosecutor’s conduct. *See United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973). In *Smith*, the prosecutor informed a defense witness, who would have provided evidence in support of the self-defense claim, that if he testified he might be prosecuted for a related charge, and advised him

that he should consult with a lawyer.⁵ The trial court appointed the public defender to advise the witness who then chose not to testify. The appellate court recognized the prosecutor's "warning" as a threat that resulted in depriving the accused of important defense evidence:

We think the prosecutor's warning was plainly a threat that resulted in depriving the defendants of [the witness]'s testimony. The government argues ... that [the witness] had a right to be advised that he might incriminate himself and be subject to prosecution if he elected to testify, and the government suggests that the prosecutor was only protecting [the witness]'s rights when he warned him. Even if the prosecutor's motives were impeccable, however, the implication of what he said was calculated to transform [the witness] from a willing witness to one who would refuse to testify, and that in fact was the result. We therefore conclude that the prosecutor's remarks were prejudicial.

Id. at 979.

Here, the prosecution's threatening advice that it was considering filing charges against Juanita and Steven Vicory had the same impact: the prosecution's threats transformed important defense witnesses from willing witnesses to ones who would refuse to testify. This violated Shapiro's rights to compulsory process and to present a defense and left the jury with only a portion of the evidence necessary to fairly and reliably determine Shapiro's guilt or innocence and placed criminal justice system in a bad light.

Prosecutors should be careful not to misuse their vast power in a way that deprives the accused of a fair chance to refute the power of the State by presenting defense evidence on his own behalf. Not only did the prosecutors in this case threaten to charge defense witnesses before trial and thus suppress evidence, they also manipulated the testimony and availability of the State's key witness, Brenda Gregg, in a way that also failed to further the truth seeking purpose of a criminal trial. Specifically, when Gregg was arrested in Texas, she was

⁵ The prosecutor, as an officer of the court, indicated that he told the witness that he "could" be prosecuted for other charges and should consult with an attorney. The witness claimed the prosecutor told him he "would" be prosecuted. *Smith, supra*, 478 F.2d at 978.

interviewed by an Aurora detective and the prosecutor's lead investigator who warned Gregg against ever talking to Shapiro's defense counsel (vII-B p33-4). This advice was not ethical. *See C.B.A. Formal Opinion No. 65.* In addition, the timing of the State's grant of immunity to Gregg for a pretrial hearing (the day of her pretrial testimony) and of Gregg's plea (the evening before her trial testimony) and of her sentencing (two months after trial), all ensured that Gregg would not be available to speak freely with the defense (v2 p367-68; v11 p121-125).

By the terms of the State's plea agreement with Gregg, the prosecution would "continue to consider and evaluate [Gregg's] cooperation and will weigh that against her criminal conduct at the time of making a sentencing recommendation [of anything from probation to six years in prison]" (v2 p367-68). Thus, because Gregg wanted badly to stay out of prison so that she would not be separated from her young children, she was disproportionately motivated to please the prosecution so that she would receive the most lenient sentence possible. The prosecution had complete control and power over this witness and could easily have provided the defense with fair access to Gregg but chose to exercise its power in a way that would discourage this.

The State's conduct in threatening key defense witnesses so they would not testify and in denying the fair pre-trial access to a key witness undermined the truth seeking function of this criminal trial and deprived Mr. Shapiro of his right to compulsory process and to a fair trial.

III. The Trial Court Erred When It Failed to Prevent the State from Using Co-Defendant Brenda Gregg's Guilty Plea to Accessory to a Crime (First Degree Murder) as Substantive Evidence that Shapiro Committed First Degree Murder.

A witness's felony conviction "may be shown for the purpose of affecting the credibility of such witness." §13-90-101, 5 C.R.S. (2002). However, in cases like Shapiro's in which a codefendant testifies for the State after pleading guilty to a related offense, this statutory rule of impeachment creates a substantial danger that the jury may use the mere fact of the co-defendant's conviction as evidence that the defendant committed the crime charged. Except for

impeachment purposes, however, the fact that a co-defendant has chosen to plead guilty is irrelevant to the question of the defendant's guilt since the defendant has a right to trial by jury and the co-defendant's decision to plead guilty may depend on many factors unrelated to the defendant's guilt or innocence.

In this case, the defense asked that the court not allow the prosecution to refer to Gregg's offense as "accessory to first degree murder," but instead refer to the offense as "accessory to crime" (v21 p13-14). The court denied this request and allowed the prosecution to introduce evidence, over objection that Gregg had pleaded guilty to accessory to first degree murder and the decision to charge her with this particular offense was one approved by both the District Attorney and the court (v21 p12-14; v22 p144). In closing, the prosecutor improperly argued that Gregg would not have pleaded guilty to accessory to first degree murder if Shapiro had acted in self-defense, because if he had there would be no first degree murder: "[t]he [defense] would like you to believe that [Gregg] so feels the need to please the prosecution that she would plead to accessory to first degree murder when she doesn't have to because there's no crime here. You see, if it's self-defense, then she didn't commit a crime. No crime. Brenda Gregg did not commit a crime if there's self-defense here." (v23 p128-29). Thus, the State's use of Gregg's guilty plea went far beyond the proper impeachment purpose permitted by law and derogated Shapiro's right to have his guilt or innocence decided on the basis of properly admitted evidence.

The fact of an alleged accomplice's guilty plea and conviction may not be used as evidence of another's guilt. *People v. Brunner*, 797 P.2d 788, 789 (Colo. App. 1990), citing *Paine v. People*, 106 Colo. 258, 103 P.2d 686 (1972) (it is inappropriate to admit evidence of an accomplice's plea or conviction to prove the guilt of the accused as to the same crime, in part because the accused is not a party to the other proceeding, has no control over it, and has no right to appear or present a defense). Moreover, "where the prosecution puts a co-conspirator on the stand and directly and deliberately elicits from him answers concerning his guilty plea to charges

arising out of the same event that defendant is charged with, such testimony may be prejudicial and inadmissible against the defendant.” *People v. Craig*, 179 Colo. 115, 498 P.2d 942 (1972).

In this case, it was prejudicial error for the court to allow the State, over objection, to introduce evidence that Gregg pleaded guilty to “accessory to *first degree murder*” when the actual title of the offense is “accessory to crime.” See §18-8-105, 6 C.R.S. (2002). By allowing the State to refer to Gregg’s crime in this way, the court created an unnecessary risk that the jury would improperly use Gregg’s conviction as substantive evidence against Shapiro. The prosecution exploited this error in closing argument in a manner that compounded the likelihood of improper use of an alleged accomplice’s plea and conviction.

The prosecution offered Brenda Gregg a plea bargain to plead guilty to “accessory to a crime,” which offense the prosecution chose to call “accessory to first degree murder,” and promised Gregg that she could apply for probation and would receive, at most, a six-year prison sentence (v2 p367-68). As part of the plea bargain, the prosecution would “continue to consider and evaluate [Gregg’s] cooperation and ... weigh that against her criminal conduct at the time of making a sentencing recommendation,” and sentencing would take place after she testified for the prosecution against Mr. Shapiro (v2 p367-68). In exchange, Gregg agreed to plead guilty and testify against Shapiro. She pleaded guilty the night before her trial testimony and her bond was continued until sentencing, which was set for after the trial (v21 p108, 113).⁶

Prior to Gregg’s testimony, the defense asked that the felony conviction be referred to as “accessory to a crime” and not as “accessory to first degree murder” and that the jury be instructed as to the limited permissible use of Gregg’s plea and conviction (v21 p12). The prosecution objected, arguing that the nature of the crime to which one is an accessory is what provides the felony level and sentencing range for the accessory crime (v21 p13-14). The court

⁶ Reference to minute orders available on GGCC/ICON show that Judge Leopold ultimately sentenced Gregg to forty-two months in the Department of Corrections. See *People v. Gregg*, Arapahoe County Case No. 00CR1430, minute order dated 2.1.01.

agreed and allowed the State to introduce evidence that Gregg had pleaded guilty to accessory to first degree murder; the court also agreed that the jury should be instructed that it “cannot draw any inference against Shapiro to the effect that he did or did not commit the crime of first degree murder” based on Gregg’s plea (v21 p14). However, when the court instructed the jury, it did not clearly instruct the jury that Gregg’s guilty plea to accessory to first degree murder could only be used for purposes of assessing her credibility and not as evidence that Shapiro was guilty of the charged crime. Rather, the court instructed the jury as follows:

[T]he defendant (sic) did plead guilty yesterday afternoon to accessory to a crime. [Defense counsel interrupted to correct court’s misstatement].

The witness pled guilty to accessory to a crime and what that is is that a person is an accessory to a crime – and I’ll explained (sic) more of this later in instructions – if with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, she renders assistance to such person.

Now, that is the crime to which she pled guilty.

In the count itself it makes reference to accessory to the charge of first degree murder; however, I specifically instruct you that although the statute sets that up as the way it is listed, it does not mean that the defendant has committed the crime of first degree murder. You must decide whether the defendant, continuing as he is to be presumed innocent, has been – has committed the crime of first degree murder beyond a reasonable doubt based only on the evidence presented here in the courtroom.

So although the statute sets up a requirement as to crime for which the witness on the stand was an accessory, the fact that she pled guilty to that does not mean that the State has proved that the defendant is guilty of murder in the first degree. It’s simply the way the law establishes the charge and the way I must advise her, as I did last night when she entered a plea of guilty.

(v21 p109-110). Nowhere in this lengthy instruction is the jury plainly told that it cannot use Gregg’s plea as evidence that Shapiro committed first degree murder.

The trial court erred in the first instance when it allowed the prosecution to introduce evidence that Gregg pleaded guilty to accessory to *first degree murder*. First, this is not the name of the felony offense to which Gregg pleaded guilty and referring to accessory to crime by this name only served to increase the potential for the jury's improper use of this evidence. In evaluating this error, it is important to keep in mind the prosecution's de minimus legitimate need for evidence of Gregg's plea. Far from seeking to impeach Gregg's testimony, the prosecution did everything possible to bolster and vouch for the truth of her testimony (v21 p110).⁷ It was the defense that had a legitimate interest in impeaching Gregg's trial testimony, and it was the defense that asked that her conviction be referred to by its statutory name "accessory to crime." Under these circumstances, the trial court committed reversible error when it allowed the State to refer to Gregg's conviction as one for "accessory to first degree murder." The court's ruling, which was induced by the prosecution's insistence that it must refer to the offense as "accessory to first degree murder," (v21 p11-14), created an unacceptable and unnecessary risk that the jury would use Gregg's plea and conviction as substantive evidence of Shapiro's guilt. *See People v. Craig, supra*.

This unacceptable risk was exacerbated by the trial court's decision to overrule defense objections to irrelevant and prejudicial evidence as to why the charge of accessory to first degree murder was filed against Gregg and to testimony that the arrest warrant and the charge of accessory to first degree murder were approved by the court and the prosecutors (v22 p144-47).⁸

⁷ Indicative of the prosecution's bolstering approach toward its witness Brenda Gregg are the following questions and answers: "Q. In thinking back over your testimony today and yesterday, have you lied to this jury? A. No" (v21 p110); "Q. Once you were arrested and charged and you had an attorney and you knew that the plan was to meet with the District Attorney's Office, what was your goal then? A. To tell the truth." (v22 p113).

⁸ A copy of the challenged testimony is attached as Appendix A to this brief for the court's information. The State's evidence was not only irrelevant it was also misleading to the extent it suggested that the prosecution did not have sufficient evidence to prosecute Gregg for anything other than accessory until Gregg spoke to them with a promise that no additional charges would

The risk was further exacerbated by the prosecution's closing argument that Gregg would not have pleaded guilty to first degree murder if Shapiro had acted in self-defense, i.e., that she pleaded guilty only because the crime committed by Shapiro was first degree murder (v23 p128-29, 137). This argument was improper, and it compounded the prejudice arising from the trial court's erroneous ruling on the admissibility of evidence that Gregg pleaded guilty to accessory to first degree murder. *See Brunner, supra; Payne, supra; Craig, supra.*

IV. The Trial Court Committed Reversible Error When It Admitted Evidence Of An Unrelated 1991 Stabbing For The "Limited" Purposes Of Establishing Motive, Modus Operandi, Intent, Plan And Preparation In This Case.

The law has long recognized that evidence of other bad acts committed by an accused is inherently prejudicial to the right of the accused to be tried for the offense charged and not on the basis of his character or other bad acts. *See, e.g., People v. Spoto*, 795 P.2d 1314, 1320 (Colo. 1990); *Stull v. People*, 140 Colo. 278, 284, 344 P.2d 455, 458 (1959); *see also* Inwinkelried, Uncharged Misconduct Evidence §§1:02, 1:03 (2001 ed.) (studies confirm that uncharged misconduct evidence eliminates the presumption of innocence, stigmatizes the defendant, and predisposes a jury to find the defendant guilty).

Because of the recognized prejudicial impact of uncharged misconduct evidence, CRE 404(b) expressly limits the admissibility of such evidence as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *See also* Inwinkelreid, *supra* at §2:19. It may, however, be admissible

be filed based on the information she gave prosecution in a proffer (v2 p367-68; v22 p144-47). In truth and law, given the prosecution's theory that Mr. Shapiro was guilty of first degree murder, could have charged Gregg with murder, pursuant to a complicity theory, before she ever gave her proffer to the prosecution. To the extent the prosecution implied to the jury that it could not have charged first or second degree murder against Brenda Gregg based on the facts known to the State before the proffer, the State's evidence was misleading. All the State had to prove, under complicity theory, is that Gregg aided the principal with intent to promote or facilitate the crime. The facts available to the prosecution before it agreed not to file additional charges provided the State with probable cause to arrest Gregg for an offense other than mere accessory.

for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” CRE 404(b); *see also, e.g., People v. Rath*, 44 P.3d 1033, 1038-39 (Colo. 2002).

The admissibility of evidence of a defendant’s prior bad acts is determined by the four-part test set forth in *Spoto, supra*. Pursuant to this test, the prosecution, if it wishes to introduce evidence of uncharged misconduct by the accused, must demonstrate that:

- (1) the evidence relates to a material fact;
- (2) the evidence is logically relevant;
- (3) the logical relevance is independent of the inference that the defendant has a bad character; and
- (4) the probative value of the evidence substantially outweighs the danger of unfair prejudice.

Spoto, 795 P.2d at 1318.

To determine whether the evidence is logically relevant independent of the inference that the defendant has a bad character, the prosecution “must articulate a precise evidential hypothesis by which a material fact can be permissibly inferred from the prior act independent of the use forbidden by CRE 404(b).” *Id.* at 1319; *accord People v. Frost*, 5 P.3d 317, 321 (Colo. App. 1999). Here, the prosecution failed to meet its burden under CRE 404(b) and *Spoto*. Evidence of an unrelated 1991 stabbing was impermissible propensity evidence, and the trial court committed prejudicial error when it admitted evidence of the 1991 assault over objection.

a. Pertinent Procedural History

Prior to trial, the State filed notice of its intent to introduce evidence of other transactions pursuant to CRE 404(b) (v1 p122-138). The State sought to introduce evidence of a 1999 argument between Shapiro and Tretter and a 1991 incident in which Shapiro stabbed David Estill in the left arm and left hand (v1 p123). The defense agreed that the 1999 argument was admissible, but objected strenuously to the admission of the unrelated 1991 assault (v2 p271-72).

The court heard argument on the admissibility of the 1991 assault (v2 p271-77, 292-99; v11 p13-43), and, as described in more detail in subsection (c) below, the court ultimately ruled that the 1991 incident would be admissible for the purpose of “showing the defendant’s Modus Operandi, Motive, Intent, Plan and Preparation, in this case” (v11 p42-50; v20 p101-2; v2 p396).

b. The State’s Offer of Proof as to the 1991 assault

In its Notice, the prosecution attached a 1991 police report and described the 1991 assault, which did not involve Tretter, by offer of proof as follows:

The defendant was living in the basement of Steve and Dawn Harker’s home in Lakewood, Colorado. The victim of the stabbing, David Estill, was a friend of both the defendant and the Harkers. The defendant had discussed with the victim, David Estill, his desire to have an affair with Dawn Harker. On the evening of the assault Dawn Harker’s husband Steve was hospitalized. Dawn Harker invited the victim David Estill to her home. While they were sitting on the couch in the home, the defendant came out of the Harkers’ bedroom and ordered the victim to leave. When the victim refused, the defendant instigated a fight. The defendant left the room and when he returned, he was armed with a kitchen knife and a meat cleaver. The defendant stabbed the victim in the left arm and left hand. (v1 p123)

Shapiro was convicted of second degree assault in connection with this incident (v1 p123).

c. The State’s argument for admissibility and the trial court’s rulings

Initially in seeking admission of the 1991 assault, the prosecution merely asserted in a conclusory fashion that the evidence “has logical relevance independent of an inference of the defendant’s bad character” and would negate the defenses of general denial, alibi or self-defense and would demonstrate “proof of motive, common plan or scheme, intent, knowledge or identity” (v1 p124). In its written brief in support of the 404(b) evidence, the State claimed that the 1991 assault and the charged offense were similar and established “pattern of behavior evidence,” which it claimed was admissible under CRE 404(b) to show “common plan, scheme, design, modus operandi, motive, intent, preparation, knowledge, identity, absence of mistake or

accident (v2 p296). The purported similarities alleged by the State were: gender of victim; defendant at some point friend of victim; defendant armed with knife during verbal dispute; expressed intention to kill victim; conflicts related to defendant's pursuit of women; attack late at night; defendant barefoot; and significant bleeding wound to both victims' arms (v2 p295-96).

The defense objected generally to the admissibility of the 1991 assault (v2 p271-72), and specifically to the State's failure to comply with *Spoto* and articulate a theory of logical relevance independent of the inference barred under CRE 404(b) (v2 p272; v11 p23-25). The trial court never required the State to articulate the requisite theory of logical relevance; nor did it articulate one itself. The wisdom of this requirement is clear in this case since any attempt to articulate a theory of logical relevance relies on the inference prohibited by *Spoto* and CRE 404(b). *See* Imwinkelreid, *supra* at §3:01 (courts should eschew a shotgun approach to the admissibility of uncharged misconduct evidence); *id.* at §9:31, citing *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999) ("there is no alchemistic formula by which 'bad act' evidence that is not relevant for a proper purpose under Rule 404(b) is transformed into admissible evidence. Thus, a proponent's incantation of the proper uses of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence. '[T]he proponent must clearly articulate how the evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.'").

Before trial, the court ruled that the 1991 assault would be admissible to prove motive, modus operandi, and identity (v11 p48). The court denied the State's request that the 1991 assault be admitted to prove common plan or scheme and reserved decision on whether the prior incident would be admissible as to intent (v11 p48-49). In ruling that the 1991 stabbing was admissible for limited purposes under CRE 404(b), the court's primary focus was on whether the prior assault was admissible to prove identity (v11 p42-50).

The court purported to follow the 4-step test in *Spoto* as follows.⁹ First, the court ultimately determined the 1991 incident related to material facts as follows: 1) motive, since both assaults involved competition for women; 2) modus operandi since both incidents involved the defendant resolving a problem by stabbing someone; and 3) identity (v11 p46, 48-49). Second, the court considered whether the evidence was logically relevant, and determined that it was essential in this 1999 case for the prosecution to prove that Tretter was stabbed and to prove who did the stabbing (v11 p46-7). Third, and the court expressly recognized this as the most difficult part of the *Spoto* analysis, the court considered whether “the logical relevance is independent of an intermediate inference that the defendant has a bad character which would lead to [impermissible] propensity evidence.” (v11 p47). As to this prong, the court never articulated the requisite precise evidentiary hypothesis, but stated that the evidence “is independent to the extent that it’s not simply being about the only thing that the State has out there.... It isn’t out there to simply establish bad character. It is designed in this case to lead to the question of a legitimate point that the State makes ... and not out there just to point the finger at the defendant to say that he did this other bad act, he obviously must have done this one” (v11 p47). And, finally, under the fourth step, the court found that the evidence, if “properly tailored” and “identified” for the jury, would be admissible under CRE 403 as its probative value was not substantially outweighed by the danger of unfair prejudice (v11 p47).

When Shapiro raised the affirmative defense of self-defense, the court modified its initial CRE 404(b) ruling and determined that the 1991 assault would also be admitted to show intent and plan and preparation (v20 p101). The court recognized that the *Spoto* calculus had changed since Shapiro was raising self-defense and, thus, conceded that he stabbed Tretter so that identity was no longer an issue (v20 p102). Nevertheless, the court determined, without explanation, that

⁹ The trial court’s complete CRE 404(b) ruling is attached as Appendix B to this brief. (See v11-10/4/00 p42-50; v20 p101-103).

the 1991 assault was even “more probative” in the context of self-defense than it had been in the context of identity (v20 p101-02). Once again, the court did not explain how the evidence was relevant absent the inference forbidden by rule and case law, i.e., that “person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue. *See Spoto, supra* at 1318. To the contrary, the court, in fact, used the prior assault evidence as propensity evidence in determining its admissibility:

I specifically find that although modus operandi typically ... is a signature-type situation, that is used more toward identity than that is not the sole purpose.

It does show literally the method by which a person does – did what he did in this case if it can be shown for the purpose, in the old case – in the prior incident to show that particular aspect of 404(b) evidence and so I find that the evidence from the testimonial side is admissible for the purposes as follows: Modus operandi, motive, intent, plan and preparation only.

(v20 p102). While the court admitted the evidence of the 1991 stabbing, it denied the State’s request that it be permitted to introduce photographs of Estill’s wounds as “[t]his would simply add to the notion of propensity as distinguished from the 404(b) purposes” (v20 p102-3).

d. The Prosecution’s Use of the 1991 Assault at Trial

The State called two witnesses to testify solely about the 1991 incident. Dawn Harker and David Estill both testified at the end of the State’s case. On the night of the 1991 incident, Harker’s husband was hospitalized. Harker, who was suffering from postpartum depression and heavily medicated at the time, testified that Shapiro, a good friend who rented and lived in her basement, came in while Estill was rubbing her neck and a fight broke out; Harker could not say who threw the first punch. Estill was winning the fight when Shapiro went downstairs for a few minutes, then to the kitchen where he got a knife and a meat cleaver; Shapiro came out in a bathrobe and said “I’m going to f---ing kill you” and stabbed Estill (v22 p155-163).

According to Estill, Shapiro had told him that Harker had a “7-year itch” and he, Shapiro,

was the one to scratch it. Estill admitted he had been kissing Harker on the night of the incident when Shapiro came in and told him to get off of her; Estill refused and they fought. Shapiro went downstairs, then went to the kitchen and came out with a knife in each hand (v22 p180). Shapiro told Estill to leave and, again, Estill refused. Shapiro came after Estill and cut Estill's hand (v22 p181). He then stabbed Estill's arm and said he was going to kill him (v22 p182-3).

The court instructed the jury that it could use testimony about this 1991 stabbing "as evidence only for the purpose of showing the defendant's modus operandi, motive, intent, plan and preparation in this case." (v2 p396).

In closing argument, the State argued that the 1991 assault was evidence that Shapiro did not act in self-defense and was guilty of the charged 1999 offense (v23 p61-63, 80-81). Specifically, the prosecutor made the following arguments: 1) that the 1991 assault showed Shapiro's "intent" in 1999 to commit first degree murder and "to eliminate a person he perceived as a problem in his life;" 2) that it was relevant to "modus operandi," since "he used a knife before he used a knife;" 3) that the victim in each incident had been a friend, was unarmed, and received defensive wounds to hands and was stabbed in the left arm; 4) that Shapiro had, according to the State, the same "motive" in each case, "to eliminate the person who stood between him and a woman;" 5) that Shapiro learned from the 1991 incident that stabbing someone can result in lots of blood, which explained Shapiro's efforts in 1999 to eliminate evidence and went to preparation; and 6) Shapiro learned from 1991 incident that it would be better to catch the victim off guard (v23 p80-81).

e. The 1991 Assault Is Inadmissible Under Applicable Law.

The central issue at trial was Shapiro's intent as it bears on the issues of self-defense, provocation and deliberation. The evidence of the 1991 assault was offered for several "limited purposes," some of which arguably relate to material facts, e.g., intent. Thus, the evidence meets the first requirement for admissibility vis-à-vis some of the purposes for which it was offered.

See Spoto, supra at 1318.

The second question under *Spoto* is whether the 1991 incident is logically relevant, “that is, whether it has any tendency to make the existence of criminal intent more or less probable.” At issue, here, is: (1) whether Shapiro had a premeditated plan to kill Tretter, and (2) whether he used the knife against Tretter in self-defense and/or defense of others. As in *Spoto*, evidence of the incident may be “logically relevant to the material issue of intent in that at a minimum, it suggests that [Shapiro] is the type of person who would use a [knife against] someone when it is not necessary for self-defense.” *Id.* at 1319.

The much more problematic question, as it was in *Spoto*, is whether the 1991 assault is logically relevant independent of the inference prohibited by CRE 404(b), *i.e.*, that the evidence demonstrates Shapiro’s character as a person who unnecessarily uses knives against people and that such character in turn suggests that Shapiro’s stabbing of Tretter was unjustified. To be admissible, the prosecution must articulate a precise evidential hypothesis by which a material fact can be permissibly inferred from the prior act independent of the use forbidden by CRE 404(b). *See, e.g., Rath, supra* at 1039; *Spoto, supra, citing United States v. Hogue*, 827 F.2d 660, 662 (10th Cir. 1987).

Here, as noted above in section IV(c), the prosecution offered no “evidential hypothesis by which a material fact can be permissibly inferred” independent of the inference that Shapiro has a bad character and acted in conformity with that character in stabbing Tretter (v1 p102-03; v2 p324; v13 p108; v11-10.4.00 p57-67; v20 p91 et seq.; v22 p47-8). The type of analysis offered by the State employed the precise theory of logical relevance that is prohibited under CRE 404(b). A primary thrust of the State’s argument is that the 1991 assault tended to show that Shapiro would use a knife against another person without justification. In essence, the prosecution argued that the 1991 assault showed a “pattern of behavior” (v2 p296). In this way, the State endeavored to use the prior assault as evidence of “habit” and to argue that Shapiro

acted in conformity with that habit. However, one prior incident, does not qualify as evidence of habit, which might be admissible under CRE 406. This “pattern” or “habit” theory of logical relevance, based on a single prior incident, is not permissible under CRE 404(b), since it makes use of the uncharged misconduct evidence as evidence of propensity as proof that the accused “acted in conformity thereto.” *See Spoto, supra.*

Finally, even if the 1991 assault could be considered admissible for some narrow purpose independent of the forbidden inference of propensity, the probative value, if any, that survives the limitations imposed by CRE 404(b) is substantially outweighed by the danger of unfair prejudice under CRE 403. As in *Spoto*, the facts in this case were disputed. Here, there was abundant evidence of Tretter’s many threats to Shapiro and others, and Shapiro claimed that he killed Tretter in defense of himself and others. The jury’s determination whether the prosecution disproved the affirmative defense of self-defense was critical to the outcome of the case. When the jury heard that Shapiro had stabbed someone previously when he was not acting in self-defense “the jury was presented with a picture of [Shapiro] as the kind of person who is prone to [stab others.]” *Spoto, supra* at 1319. The 1991 incident, thus, cast doubt on the defense of self-defense and defense of others and, as in *Spoto*, “presented the grave danger that it would be employed by the jury to infer bad character and action taken in conformity with bad character. The potential for prejudice in this case was overwhelming.” *Id.* at 1320-21.

The prejudice in Shapiro’s case was in no sense diminished by the court’s “limiting” instruction. To the contrary, the court’s instruction encouraged the improper use of the 1991 stabbing as propensity evidence. For example, the court instructed the jury that it could use the 1991 incident as proof of “Modus Operandi,” which is Latin for “a manner of operating.” *Black’s Law Dictionary* at 1020 (7th ed.). Usually, modus operandi is a permissible use of uncharged misconduct evidence in cases in which identity is an issue and the defendant is shown to have committed another crime in a “strikingly similar” manner. *See, e.g., People v. Ridnour,*

878 P.2d 23, 28 (Colo. App. 1994); *see also* Imwinkelreid, *supra* at §5.34. The theory of admissibility in such cases, which is independent of the propensity inference barred under CRE 404(b), is that since the accused committed another crime, which bears striking similarity to the crime charged, it makes it more likely that he also committed the crime charged. When, as here, identity is not an issue and/or the uncharged crime does not bear a striking similarity to the crime charged, “manner of operating” is nothing more than pure propensity, the theory of logical relevance being the precise theory prohibited under CRE 404(b) and *Spoto*, i.e., since defendant committed a previous crime it is more likely that he is guilty of the crime charged.

Shapiro was entitled to a fair determination of his guilt or innocence of the charged crime. The erroneous and prejudicial admission of the 1991 stabbing assault deprived Shapiro of this right and was reversible error. *See Spoto, supra*.

V. Mr. Shapiro’s Right To A Reliable Determination Of His Guilt Or Innocence- Was Violated By The Erroneous Admission Of Inflammatory, Unnecessary And Misleading Photographs.

Pursuant to CRE 403, evidence should be excluded if its probative value is substantially outweighed by the possibility of unfair prejudice. Here, the trial court erred in admitting, over objection, Exh. 65 (a family photograph of Tretter with Brenda Gregg and the twins), and Exh. 31 (an extremely graphic autopsy photograph, which is duplicative to other admitted photographic Exh.s). Because Exh. 31 is so graphic and disturbing, counsel for Shapiro respectfully requests that this Court not view the photograph until it has finally decided all other appellate issues. Although counsel asserts this photograph was erroneously admitted and that its admission was prejudicial reversible error, counsel has raised the issue with some fear that this Court’s viewing of the Exh. will unduly prejudice the court vis-à-vis the other issues Shapiro has raised on appeal. To lessen this possibility, counsel makes this unusual request and asks that the court consider this issue only after resolving the other issues raised on appeal.

a. The Misleading Photograph of Tretter, Gregg and the Twins.

Prior to trial, the defense filed a motion in limine to exclude the admission of what it referred to as the “‘happy family’ photograph of Brenda Gregg, Patrick Tretter and their twin children” (v2 p377). The defense argued that the picture, which had been taken before Tretter’s divorce, was misleading. The defense argued the photograph would open the door to character evidence that Tretter was not an upstanding family man; that identity was not an issue; and that the prosecution could use another photograph if it thought a photograph necessary (v16 p4). In response, the prosecution argued that the photograph was “‘appropriate;” the jury already knew Tretter had been married and was the father of twins; and that it was the only photograph the prosecution had of Tretter (v16 p5). The court agreed with the defense that the photograph was misleading and agreed with the prosecution that they were entitled to introduce a photograph of the deceased (v16 p5). Accordingly, the court ordered the prosecution to crop the photograph to remove Gregg’s image and then permitted admission of the photograph (v16 p6).

This was error. There was no need to admit a photograph of the deceased and his children. While the prosecution may indeed have a right to introduce a photograph of the deceased, it does not have a right to admit a misleading photograph or a photograph that contains irrelevant or prejudicial material. It is no answer that the prosecution has only one photograph of the deceased. If the prosecution had wanted it could easily have obtained a photograph of Tretter alone, but it chose not to.

Moreover, even a casual glance at the cropped photograph reveals that Brenda has been cut out of the photograph as her hair and a small portion of her face is plainly visible (Exh. 65). Ironically, the cropped photograph is misleading in a way that the full photograph was not; the cropped photograph permits jurors to speculate that Tretter may have cut Brenda out of the photograph. This might tend to suggest that Tretter had “‘moved on” and may have undermined abundant properly admitted evidence that Tretter was obsessed with his ex-wife.

b. The Duplicative, Extraordinarily Graphic Post Mortem Photograph of Tretter's Wounds.

Although a trial court has broad discretion in admitting photographs, its discretion is not unlimited. *People v. Ellis*, 589 P.2d 494, 495 (Colo. App. 1978).

From the outset, the court expressed concern over the extremely graphic nature of the post-mortem photographs of Patrick Tretter (v11 p85; v13 p91,96). For example, it overruled the State's objection to including a question about the graphic photographs in the jury questionnaire by asking "if we have a particularly squeamish person, why are we bringing that person into the courtroom in the first instance. If he or she says this is going to nauseate me, I will have a physical reaction, I don't even want to have the person coming into the courtroom" (v13 p91-97). The photographs of Tretter's wounds were so graphic, the court felt compelled to warn the jurors about the "difficult photos" they would view (v2-C-11.3.00 p18).

At trial, the fact that Patrick Tretter died of multiple stab wounds was not disputed, nor was the issue of causation contested. Thus, the graphic autopsy photographs were of limited evidentiary value. *Compare People v. Harris*, 633 P.2d 1095 (Colo. App. 1981) (photographs of child victim's brain admissible to show magnitude of injuries); and *Archina v. People*, 135 Colo. 8, 307 P.2d 1083, 1095 (1957) (where victim shot, "the pictures of the naked body on the marble slab have no probative value in establishing any issue in the case.") As recognized in *Archina*, the use of autopsy photographs may be abused in a manner that inflames the passions of the jury and encourages jurors to decide cases based on emotion and not reason or proof:

Generally speaking it is the duty of the District Attorney to present all available facts so that the jurors may, through their mental processes, arrive at the guilt or innocence of the defendant. It is not his duty or right to produce or present evidence that has no probative value and that serves only to arouse the passions and prejudices of the jurors. These [autopsy] photographs do not serve to stimulate the mental processes of the jurors, but only to arouse their passions and prejudices—and to cause them to abandon their mental processes and give expression to their emotions.

Archina, 307 P.2d at 1095.

There is no good reason to admit gruesome autopsy photographs when they create a completely unnecessary risk of distracting jurors from their proper task of determining the pertinent facts and fairly applying the law to such facts. Here, the prejudicial impact of the challenged photograph was exacerbated by the State's repeated use of high tech screens that both enlarged the photograph on a large screen and duplicated the photograph on individual screens that were right in front of all jurors (v1 p267; v2-C p32; v23 p52, 67,82). Not only did the prosecution publish the challenged photograph during the presentation of testimony, the prosecution commenced and concluded its closing argument with dimming the courtroom lights and having the jurors again focus on the enlarged version of graphic photographs (v23 p52,82).

Cognizant of the prosecution's right to prove its case largely as it sees fit, the defense objected to only one of the nine autopsy photographs offered by the prosecution (v19 p38-40; Exhibits 27-35), and did not object to the four graphic photographs taken of Tretter's body where it was found (Exhibits 36, 38-40). While the photographs tended to show the number and location of wounds, they were also misleading to the extent that the wounds visible at the autopsy were exaggerated from the wounds one would have observed at the time of the stabbing (v19 p89). As noted by the coroner, the wounds begin to gape after death and, consequently, appear significantly larger on the photographs (v19 p89). The defense objected to Exhibit 31 because it was extremely graphic and duplicative of Exhibit 35 (v19 p38-40). In overruling the defense objection, the court stated that, while it generally agreed with the defense, it noted "two distinctions," that being the measurement device and chest injuries found in Exhibit 35 and that Exhibit 31 showed more detail (v19 p39-40).

Exhibit 31 is a graphic close up of the injuries to Tretter's neck and face, which are also shown in a less inflammatory way in Exhibit 35. The trial court's ruling failed to properly consider whether the probative value effect of Exhibit 31 was substantially outweighed by the

danger of unfair prejudice. *See Archina, supra*; CRE 403. Exhibit 31 should have been excluded since it added too little to Exhibit 35 to justify the danger of unfair prejudice. *See id.*; *Ellis, supra*. As noted in Argument VI, Exhibit 31 was so graphic that it caused one juror to become ill; this is precisely the sort of emotional reaction that should be avoided if possible and which would have been avoided if the court had properly precluded the admission of Exhibit 31.

c. Conclusion

Exhibit 31, the extraordinarily graphic post-mortem photograph of the knife wounds to Tretter's neck and face unnecessarily inflamed the passions of the jury and the court erred in permitting its admission over objection. Exhibit 65, the cropped photograph of Tretter and the twins should have been excluded pursuant to CRE 403 as it was misleading.

VI. The Trial Court Erred When It Refused To Dismiss a Juror After He Became Physically Ill In Reaction To The Erroneously Admitted Autopsy Photograph .

Both the court and the defense expressed strong concerns prior to jury selection about the ability of jurors to view graphic autopsy photograph, including Exh. 31, which the court characterized as "one of the more graphic photos" the court had ever seen in its "years on the bench and in practice" without unfair prejudice to the accused (v11-10.4.00 p85; v13 p96). To this end the court warned the jurors that there would be "difficult photos," and one juror was excused when he indicated (v2 p146, 182). These concerns were more than validated when Juror Jahen, who ultimately became the foreman, became ill and fainted while viewing Exhibit 31, the autopsy photograph, the admission of which is challenged in Argument V, and had to be comforted by another juror (v19 p45).

During the coroner's testimony, the prosecutor projected an enlarged image of Exhibit 31 on a main screen and on screens located along the jury box (v19 p43-44, 48). The court noticed that Juror Jahen was distressed and had his head turned away from the screens, resting on juror Tholkes's shoulder. The court immediately called a fifteen minute recess (v19 p43-45). The

court noted that Juror Tholkes “was stroking [Juror Jahen] and talking to him and he was visibly obviously moved ... appeared to be somewhat ashen” (v19 p45).

After the recess the court questioned Mr. Jahen outside the presence of the other jurors about how he felt, and Mr. Jahen indicated that he was feeling better and that he thought he could continue (v19 p46). Counsel for Shapiro requested an opportunity to question Mr. Jahen but the court denied that request and said that counsel could ask the court to ask the juror a question, after which the court held a bench conference off the record (v19 p47,49). In response to additional questions by the court, the juror acknowledged that he had expressed concerns in response to the following question: “This case involves multiple stab wounds. To what extent, if any, would this affect your ability to be fair & impartial.” In response, Juror Jahen wrote, “I do not do well seeing blood. (was traumatize[d] when I was about 4 yrs old after falling over sheet metal.” (v19 p47; Jahen jury questionnaire) The court then asked how the juror thought “this affects your ability to “weigh the evidence” and “render a fair verdict.” (v19 p47) The juror said he thought he could be fair (v19 p47-48).

The defense objected to the court’s absolute bar to questioning of the juror by counsel (v19 p49). Defense counsel indicated that he had additional questions he would have asked of the juror and pointed out that the problem was not just with Juror Jahen but also with the impact of his emotional display on the other jurors.

The defense asked that Juror Jahen be excused or that a mistrial be granted (v19 p49). The court denied the defense request but indicated that it would continue to watch the jurors (v19 p50). In addition the court noted that it had made arrangements for a psychologist to be available to debrief any juror for an hour at state expense “should it become necessary.” (v19 p51)

Soon after the conclusion of the coroner’s testimony on a Thursday, the defense again asked that the court excuse Juror Jahen (v19 p145-46). Defense counsel observed that the juror seemed to suffer from an involuntary reaction to the sight of blood. Counsel told the court she

had watched the juror and he had appeared to pass out when he viewed photographs with a lot of blood and that he now appeared to avert his eyes from such evidence; that he was “very visibly shaken and ashen and could not even look at the evidence;” and that he had “gagged” nearly “throw[ing] up” during the presentation of evidence (v19 p146-47). The defense asked that the juror be excused because of his inability to view all the evidence and the impact his problems were having on the other jurors (v19 p145-47). The prosecution disputed defense counsel’s observation, stating that, although the juror was not looking at the large screen in the courtroom, they believed he was viewing the smaller screen near his seat in the jury box (v19 p148). Even so, the State conceded that the juror was having a greater reaction to the photographs than other jurors (v19 p148). The court had a third perspective, which was that the juror “did avert his glance at certain times, both to the screen in the jury box and the big screen, but he also was not averting his glance during part of these presentations (v19 p148).

The court deferred ruling and decided to question Juror Jahen the following Monday (v19 p148-49). On Monday morning the court again spoke to Jahen outside the presence of the other jurors (v20 p7-10). The juror acknowledged being “distressed” the previous week but said he “believed” he could be fair and that he had “pretty much” been able to put the matter aside for the week and go about his business (v20 p8-9).

It was error in this case, where there were two alternate jurors available (vII-C-11.3.00 p13), for the court to deny the defense request to excuse juror Jahen and to not question other jurors about their continued ability to be fair and impartial in light of Jahen’s dramatic reactions to the graphic photographs.

An accused is guaranteed the right to a trial by jurors who are fair and impartial. U.S. CONST., amends. VI, XIV; COLO. CONST., art. II, §§16, 25; *Duncan v. Louisiana*, 391 U.S. 145 (1968); *People v. Macrander*, 828 P.2d 234, 245 (Colo. 1992); *People v. Russo*, 713 P.2d 356 (Colo. 1986). The right to trial by an impartial jury requires a determination of the issues “solely

on the basis of the evidence presented at trial rather than on the basis of bias or prejudice for or against a party.” *Harris v. People*, 888 P.2d 259, 264 (Colo. 1995). Further, “[t]he conduct of justice must not only achieve the reality of fairness, it must also ‘satisfy the appearance of justice.’” *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994) quoting *In re Murchison*, 349 U.S. 133, 136 (1955). An impartial jury thus requires the participation of jurors who are not biased in fact and who do not appear biased. See *Macrander*, 828 P.2d at 238. In this case, the trial court should have excused juror Jahen after his inability to consider all evidence in a rationale fashion became obvious and after concerns were raised about the effect of juror Jahen’s problems with graphic evidence on the other jurors.

VII. The Trial Court Erroneously Instructed The Jury On The Affirmative Defense Of Self-Defense and, Thus, Lessened The State’s Burden Of Proof And Violated Shapiro’s Right To Trial By Jury.

It is the duty of the trial court to instruct the jury adequately and completely on the guiding legal principles and issues raised in a case. *E.g.*, *People v. Cowden*, 735 P.2d 199, 202 (Colo. 1987). It is only when a jury has been correctly instructed as to each element of a charged offense and as to any other controlling legal principles that the accused can be guaranteed her fundamental rights to have a jury determine guilt or innocence and to have the prosecution held to its proper burden of proof of beyond a reasonable doubt as to each ingredient of the charged offense. See U.S. CONST., amends. V, VI, XIV; COLO. CONST., art. II, §§ 23, 25; *In re Winship*, 397 U.S. 358 (1970); *Cooper v. People*, 973 P.2d 1234 (Colo. 1999); *People v. Vance*, 953 P.2d 576 (Colo. 1997). Instructions are also constitutionally deficient if, when taken as a whole, they are confusing to the jury. *E.g.* *People v. Mattas*, 645 P.2d 254, 259 (Colo. 1982).

A conviction may not stand absent proof beyond a reasonable doubt of every element of the offense, as well as disproof of every element of any applicable affirmative defense. U.S. Const. amend. XIV; Colo. Const. art. II, § 25; *Douglas v. People*, 969 P.2d 1201, 1207 (Colo. 1998) (self-defense absolves defendant of criminal responsibility unless the prosecution disproves its existence

beyond a reasonable doubt). “Where the record contains any evidence tending to establish the defense of self-defense the defendant is entitled to have the jury properly instructed with respect to that defense. A trial court must tailor instructions to the particular circumstances of a given case when the pattern instructions, taken as a whole, do not adequately apprise the jury of the law of self-defense from the standpoint of the defendant.” *People v. Roberts*, 983 P.2d 11, 14 (Colo. App. 1998); *People v. Idrogo*, 818 P.2d 752, 754 (Colo. 1991). As set forth below, the court’s instructions in Shapiro’s case failed to instruct the jury adequately on the law of self-defense.

Pursuant to Colorado law, §18-1-704, 6 C.R.S., the use of physical force against another is justified under the following circumstances:

(1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; ...; or

(c) The other person is committing or reasonably appears about to commit ... assault as defined in sections 18-3-202 and 18-3-203.

Numerous cases hold that when a self-defense or defense of others claim is raised, the court must adequately instruct the jury on the applicable law of self-defense. *E.g.*, *People v. Janes*, 982 P.2d 300 (Colo. 1999); *Idrogo, supra*; *People v. Beasley*, 778 P.2d 304 (Colo. App. 1989). The jury in this case was inadequately instructed on self-defense in a manner that lessened the prosecution’s burden of proof. Specifically, the instructions erroneously suggested that one could not use deadly physical force against another unless the other was armed with a weapon. Under the facts of this case, this misstatement of law was prejudicial reversible error.

As provided by statute, a person can use deadly physical force against another if “[t]he other person is committing or reasonably appears about to commit ... assault as defined in sections 18-3-202 and 18-3-203.” §18-1-704(2)(c); *see also Janes, supra*. “Assault,” in turn, includes all first degree and second degree assaults as defined by statute. *See* §18-3-202 (first degree assault); §18-3-203 (second degree assault). These statutorily defined assaults do not necessarily require use of a deadly weapon. *See* §18-3-202(1)(b) and (c); §18-3-203(1)(c). And, even those types of assault that require use of a “deadly weapon”¹⁰ can be proved when the assailant is armed not with a weapon, but is using own fists. *People v. Ross*, 831 P.2d 1310 (Colo. 1992) (held fists may be deadly weapons if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury).

Thus, the law does not require that one’s opponent have or appear to have a deadly weapon before one may use deadly physical force when one’s opponent is committing a first or second degree assault or reasonably appears about to commit such an assault. And, even if the type of assault involved requires that one’s opponent have or appear to have a “deadly weapon,” that requirement may be met when one’s opponent is using or about to use their fists “if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury.” *Ross, supra* at 1313.

Contrary to this clear law and the clear language of the self-defense statute, as quoted above, as the jury was instructed in pertinent part as follows:

¹⁰ “Deadly weapon” is defined by §18-1-901(3)(e), C.R.S, to mean:

“any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A firearm, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.”

It is an affirmative defense to the crime of Murder in the First Degree-After Deliberation and Murder in the Second Degree that the defendant used deadly physical force because:

1. he reasonably believed a lesser degree of force was inadequate, and
2. had reasonable grounds to believe, and did believe, that he or another person was in imminent danger of being killed or of receiving great bodily injury, or
3. another person was about to cause or reasonably appeared about to cause bodily injury to any person by means of a deadly weapon.

(v2 p401). Paragraph 3 of this instruction differs from the pattern instruction, COLJI-Crim. 7:07, and the statute. Paragraph 3 of the pattern instruction, which reflects §18-1-704(2)(c), requires that “another person was committing or reasonably appeared to be about to commit assault.” COLJI-Crim. 7:07. The “Notes on Use” section indicates that the definition of the pertinent crime in paragraph 3 be included in the instructions.

In contrast to both the pattern instruction and the self-defense statute §18-1-704, the instruction used in Shapiro’s case required that Tretter have or appear to have had a deadly weapon. Since this is not necessarily required by law for the justified use of deadly physical force, the jury may have wrongly deprived Shapiro of his right to use justified physical simply because they did not believe Tretter had a deadly weapon.

This prejudice arising from the error in the self-defense instruction was compounded by the trial court’s refusal to give a defense-tendered instruction that would have apprised the jury that fists may be considered a deadly weapon:

You are instructed that “fists” may be deadly weapons, if in the manner they are used or intended to be used, they are capable of producing death or serious bodily injury.

(v2 p451). The court erred when it refused to give this instruction since it is a correct statement of law. *See Ross, supra*. This instruction was necessary, in light of the facts of this case, for the jury’s adequate understanding of the parameters of the affirmative defense of self-defense. *See*

People v. Ferguson, 43 P.3d 70 (Colo. App. 2002)(reversal required where jury wrongly instructed on use of deadly physical force and deadly physical force improperly defined).

VIII. The Cumulative Effect of Error Denied Mr. Shapiro His Due Process Right To A Fair Trial.

The cumulative effect of error may preclude a defendant from receiving a fair trial and thus constitute reversible error. *E.g.*, *People v. Botham*, 629 P.2d 589, 603 (Colo. 1981). “[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal would be required.” *People v. Reynolds*, 194 Colo. 543, 575 P.2d 1286, 1289 (1978); *Oaks v. People*, 150 Colo. 64, 371 P.2d 443 (1962). The cumulative impact of the errors raised in Arguments I-VII, above, require a new trial. Here, the number and impact of the many errors deprived Mr. Shapiro of his right to a reliable determination of his guilt or innocence by an impartial jury.

CONCLUSION

For the reasons set forth above, Mr. Shapiro respectfully requests that this Court reverse his conviction and remand the cause for new trial.

Dated this ____ day of March 2003.

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CERTIFICATE OF SERVICE

I certify that, on March 31, 2004, a copy of this Opening Brief was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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