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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Denver District Court Honorable Martin F. Egelhoff, Judge Case No. 06CR10408	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. MARTIN VILLANUEVA, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No.: 07CA858
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STATEMENT OF THE CASE

Defendant, Martin Villanueva, was charged by information with one count of first degree murder[1] for the shooting death of Benjamin Garcia-Diaz. (v. 1, p. 1). Following a jury trial, defendant was convicted as charged. (v. 2, p. 336). On March 22, 2007, he was sentenced to a term of life in the Department of Corrections, without the possibility of parole. (Id., p. 339). This appeal followed.

STATEMENT OF FACTS

Mario Rivera witnessed the murder. He testified that, on March 26, 2005, he was at the La Sierra nightclub with the victim and another man named Sergio Gonzalez (nicknamed "Guero"). (v. 16, p. 42, 319). Around 10:00 p.m., defendant and defendant's brother Ignacio Villanueva joined Rivera and the victim at La Sierra. (Id., p. 320). Later in the evening, Guero, Rivera, Ignacio, defendant, and the victim went to another bar called Las Tres Potrancas, where they stayed until 1:30 or 2:00 a.m. (v. 16, p. 56, 58). Guero then went home because he was "too drunk." (Id., p. 60).

Rivera testified that around 1:30 a.m., he, the victim, defendant and defendant's brother drove three separate vehicles to a nearby 7-11 gas

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[1] § 18-3-102(1)(a), C.R.S. (2008); F-1

station/convenience store. (v. 10, p. 11). The victim was driving his white Ford Expedition, defendant and his brother were in a Buick SUV, and Rivera was driving a friend's Honda. (v. 10, p. 6). Rivera testified that the victim went inside the 7-11 to pre-pay for gas for his Expedition and for Rivera's Honda. (Id., p. 14). Rivera said that after police told people to leave the 7-11 parking lot, they each drove their vehicles a few blocks away and parked on the street.[2] (Id., p. 15). Rivera testified that nobody was out on the street where they parked. (Id., p. 24).

Rivera said that the victim was sitting in his parked Expedition with his windows down. (Id., p. 26). Rivera testified that he parked across the street from the victim and walked over to the passenger-side window to ask the victim for a cigarette. (Id.). Rivera heard the victim say that he wanted to go home. (Id., p. 27). Rivera saw defendant go into a nearby property with a chain-link fence. (Id., p. 28). Rivera thought defendant used a key to get into the fenced area. (Id., p. 29).

Rivera saw defendant walk up to the driver's side of the victim's car, while holding a black compact disc (CD) case. (Id., p. 31). Rivera testified that defendant rested the CD case on the driver's side door. (Id., p. 32). Rivera heard

[2] Although Rivera did not know this at the time, the vehicles were parked outside of defendant's home. (v. 10, p. 25-26, v. 16, 108-109).

defendant say, "What's going on?" and the victim answered, "I want to go home." (Id., p. 33). Defendant then said, "No, you're coming with us" and the victim said, "No, I'm going home." (Id.).

Rivera testified that he saw the CD case come down and saw a gun come up. He said that defendant pointed the gun at the victim's head and said, "you're going to come with us." (Id., p. 34). The victim repeated, "No I'm going to go home" and brushed aside the gun. (Id.). The victim said to defendant, "Don't play, don't play." Defendant repeated, "You're going to come with us" and then shot the victim in the head at close range. (Id.).

Immediately after the shooting, Rivera got in his car and drove away. (Id., p. 41). He testified that, as he drove off, he saw defendant waving him back, calling him. (Id., p. 42). Rivera testified that he had met defendant about five times before that night, and had spoken with defendant maybe one time. He explained that he "didn't want to know [defendant]." (v. 16, p. 312-313).

The prosecution's theory of the case was that defendant killed the victim over a $30,000 drug debt. A few months before the murder, police responded to the victim's house to investigate a domestic disturbance. (v. 10, p. 191-194). Over 1,400 grams of cocaine were seized from the victim's home. (Id., p. 216-217). The victim told several witnesses that the seized drugs belonged to defendant. (v.

10, p. 59, 265; v. 11, p. 79). Juan Garcia, the victim's brother, heard defendant threaten to kill the victim because of the missing drugs on two separate occasions. (v. 10, p. 244, 268-269, 271-272). The victim also mentioned these threats to Ilda Garcia, and told Mary Garcia that he feared for his family. (v. 11, p. 63-64, 79).

The day after the shooting, the victim's Expedition was found burning in a Weld County field. (v. 16. p. 173). A Denver fire investigator concluded that the fire was caused by a human being using an accelerant, that the fire was very hot and intense, and that the fire originated inside of the vehicle. (Id., p. 230-240). Six months later, the victim's remains were discovered in Weld County by a hunter. (Id., p. 199-201, 223).

STATEMENT OF THE ISSUES PRESENTED

I. Did the court violate defendant's right to confrontation by limiting cross-examination of a prosecution witness?

II. Did the court abuse its discretion by improperly admitting the deceased's hearsay statements?

III. Did the court abuse its discretion by improperly admitting evidence of other acts under CRE 404(b)?

IV. Does cumulative error require reversal?

SUMMARY OF THE ARGUMENT

The court did not violate defendant's right to confrontation by limiting cross-examination of a prosecution witness where the evidence was of marginal relevance, was "extraordinarily prejudicial," had a "substantial tendency… to mislead the jury," and did not tend to establish the witness' bias, prejudice, or motive for testifying against the defendant. No abuse of discretion occurred, and any error was harmless.

The court did not abuse its discretion by admitting, under CRE 807, the victim's hearsay statements regarding: (1) his prior drug dealing with defendant, (2) that he owed defendant $30,000 for drugs seized by police, and (3) defendant's multiple threats to kill the victim and the victim's family. Each of the statements

was relevant to defendant's motive, knowledge, and identity, and possessed circumstantial guarantees of trustworthiness.

The court did not abuse its discretion by admitting, under CRE 404(b), evidence regarding the victim and defendant's drug dealing enterprise and defendant's numerous threats to kill the victim. The evidence was highly relevant and was not unfairly prejudicial.

Defendant has not established cumulative errors sufficient to warrant reversal of his conviction.

ARGUMENT

I. The court did not violate defendant's right to confrontation by limiting cross-examination of a prosecution witness where the evidence was of marginal relevance and did not tend to establish the witness' bias, prejudice or motive for testifying against defendant.

A. Standard of review

Confrontation Clause claims are reviewed *de novo*. Bernal v. People, 44 P.3d 184, 198 (Colo. 2002). The standard applied to preserved Confrontation Clause violations is whether the error is harmless beyond a reasonable doubt. This is not an analysis of whether a guilty verdict would have been rendered in a trial without the error, but what effect the error had on this verdict. Raile v. People, 148 P.3d 126, 133 (Colo. 2006).

B. Defendant's claim

Defendant claims that the trial court infringed upon his right to confrontation by refusing to allow him to impeach Mario Rivera with Rivera's out-of-court statements that contradicted Rivera's trial testimony regarding his ownership and familiarity with guns. (Opening brief, p. 16).

During Rivera's direct testimony, the prosecutor asked Rivera if he had "[a]ny idea what kind of gun" defendant used. (v. 10, p. 34). Rivera answered, "From me knowing guns, no, I can't tell you what kind of gun it was, but it was a big gun." (Id.). Later, the following exchange occurred:

Prosecutor:	What kind of gun was it? You said you don't know the caliber, you thought it was big?
Witness:	Yeah.
Prosecutor:	Do you know what color?
Witness:	It was a dark silver, dark metallic color.
Prosecutor:	Was it a revolver?
Witness:	No, it was an automatic.

(Id., p. 39-40).

During cross-examination, defense counsel pursued the following line of inquiry:

Counsel:	And you also told Detective Wilson what kind of gun it was, did you not?

Witness:	Yes.
Counsel:	Told him it was a 9 millimeter?
Witness:	Yes.
Counsel:	And you've told this jury today that you don't know what kind of gun it was, only that it was big?
Witness:	Yes.

(Id., p. 71). A few minutes later, this exchange occurred:

Counsel:	Let me ask you something, sir, you said it was a big gun, you can't tell us what it is?
Witness:	Yes.
Counsel:	Do you have any working knowledge of 9 millimeters?
Witness:	No, I don't.
Counsel:	Have you owned a gun?
Witness:	No, I don't.
Counsel:	Did you shoot a 9 millimeter gun?
Witness:	Yes.
Counsel:	Who did it belong to?
Witness:	My friends.
Counsel:	And was that on a single occasion?
Witness:	I think it was a couple times.
Counsel:	But you yourself never owned a gun?
Witness:	No, never.
Counsel:	Do you know the difference between a 9 millimeter and revolver?
Witness:	Yes.

Counsel:	How so?
Witness:	The revolver, the other one is from clips, and the revolvers are rounded.
Witness:	The barrel has pins?
Counsel:	The barrel has pins.
Counsel:	Did you get that from TV?
Witness:	No, I just seen. Yeah, pretty much.
Counsel:	Have you ever owned a revolver?
Witness:	No.
Counsel:	Never owned a gun of any type?
Witness:	No.
Counsel:	Never had a gun of any type, I gather?
Witness:	I've shot guns, but never owned.
Counsel:	Never had one that was yours?
Witness:	No.
Counsel:	Now, have you ever worried about having your fingerprints on guns?
Witness:	No.
Counsel:	Have you ever talked to anybody about having your fingerprints on guns?
Witness:	No.
Counsel:	This 9 millimeter, did it have a banana clip?
Witness:	Yes.
Counsel:	And so you know what a banana clip is?
Witness:	Yes.
Counsel:	And have you ever worked on guns?
Witness:	No. I don't know.
Counsel:	Ever taken a 9 millimeter apart?

Witness: No.

Counsel: Ever changed barrels, anything like that?

Witness: No.

(Id., p. 82-84).

Counsel then asked to approach the bench, and informed the court that he intended to cross-examine Rivera about six separate recorded conversations Rivera had with a man named "Neo," a year and a half after the murder. (Id., p. 85). Defense counsel said that the statements were inconsistent with Rivera's testimony regarding his "knowledge of guns, his ownership of guns, et cetera." (Id., p. 86). The prosecutor objected on relevancy grounds. (Id.). The court took a recess to allow the prosecution to review the recorded conversations. (Id., p. 88).

After the break, the parties discussed the matter at length in chambers. (Id., p. 89-106, 109-114). Defense counsel specified that the statements he wanted to address on cross-examination involved Rivera's "ownership and control over various weapons, one of them being one with a banana clip with a 30-round clip," statements about wiping down a gun to remove fingerprints, and a discussion about changing the barrels of a weapon to change the grooves left in the bullets. (Id., p. 92). Counsel argued,

> This goes to what is replete throughout this case, which seems to be that Mario Rivera doesn't have knowledge of

> weapons, doesn't know what's going on, doesn't have guns. It goes to his credibility. It goes to what weapon, if any, was used.

(Id., p. 92-93). The proffered statements were read into the record. (Id., p. 95-96, 98-100). A copy of the relevant portion of the transcript is attached to defendant's Opening Brief.

After hearing the substance of the proffered statements, the prosecutor renewed her relevancy objection, and argued that the statements were also "overwhelmingly prejudicial." (Id., p. 101).

The trial court first recognized that the law provides for "wide latitude with respect to impeaching or challenging the credibility of witnesses" and that "this particular witness is the crucial witness here." (Id., p. 102). The court then listed its concerns: (1) none of the statements actually impeached Rivera's testimony that he did not know what kind of gun defendant used to shoot the victim; (2) Rivera discussed the difference between a revolver and a 9 millimeter semiautomatic, and thus did not deny "all knowledge of gun[s]"; (3) the statements do not impeach Rivera's testimony that he did not own a gun, but had fired guns owned by his friends; and (4) the statements are "extraordinarily prejudicial." (Id., p. 102-103).

The court elaborated on the matter of unfair prejudice:

> [The statements] are highly prejudicial in the sense that they deal with other transactions that may or may not have occurred involving other acts which may not have occurred.
>
> They have a substantial tendency, I think, to mislead the jury, to lead them down the wrong path, to distract them from the issues in this case, and is marginal, at best, that this value has to impeaching the limited testimony we're talking about, is substantially outweighed by the unfair prejudice and confusion of the issues.

(Id., p. 103). The court declined to admit the evidence. (Id.). After further argument, the court affirmed its ruling that "the marginal relevance is outweighed by the substantial prejudice." (Id., p. 110-114).

C. Law and argument

"The trial court has discretion to determine the scope and limits of cross-examination, and, absent an abuse of discretion, the court's rulings will not be disturbed on appeal." People v. Rodriguez, 914 P.2d 230, 267 (Colo. 1996).

Under the Rules of Evidence, cross-examination generally "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." CRE 611(b). Even relevant cross-examination on proper topics may be limited "if its probative value is substantially outweighed by other considerations such as unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless

presentation of cumulative evidence." CRE 403; *see* Vega v. People, 893 P.2d 107, 118 (Colo. 1995); Merritt v. People, 842 P.2d 162, 166 (Colo. 1992).

Thus, for example, cross-examination which places undue emphasis on collateral matters is properly limited to prevent the "sideshow" from taking over the "circus." *See* People v. Cole, 654 P.2d 830 (Colo. 1982); People v. Taylor, 545 P.2d 703, 706 (Colo. 1976).

Where, as here, the defendant claims that the trial court's limitation of his cross-examination also violated his constitutional right to confrontation, similar principles govern the analysis of the constitutional claim. *See* Vega v. People; Merritt v. People.

The Confrontation Clause of the United States Constitution guarantees to a criminal defendant the right to an opportunity to cross-examine witnesses testifying for the prosecution. U.S. Const. amend. VI; Delaware v. Van Arsdall, 475 U.S. 673 (1986); Vega, 893 P.2d at 118; (Colo. 1995); Merritt, 842 P.2d at 165. "[I]t is constitutional error to limit excessively a defendant's cross-examination of a witness regarding the witness' credibility, especially cross-examination concerning the witness' bias, prejudice, or motive for testifying." Vega, 893 P.2d at 118; Merritt, 842 P.2d at 167.

However, the constitutional right to cross-examine "is not absolute," People v. Cole, 654 P.2d at 833, and it "does not mean unlimited cross-examination." Merritt, 842 P.2d at 166. "The scope and duration of cross-examination is under the control of the trial court subject to well-established rules," including those embodied in the Rules of Evidence. Id.

"Thus, a trial court has wide latitude, insofar as the Confrontation Clause is concerned, to place reasonable limits on cross-examination based on concerns about, for example, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation which is repetitive or only marginally relevant." Id.; Delaware v. Van Arsdall, 475 U.S. at 679.

Here, the issue of whether the eyewitness to the murder owned a gun and was familiar with guns was only marginally relevant. This is especially true in light of defendant's asserted defense – that he did not commit the crime and that, "nothing out of the ordinary occurred [at the alleged crime scene] on March 27, 2005." (v. II, p. 332).

Additionally, while the statements somewhat contradicted Rivera's trial testimony about his ownership of and familiarity with guns, the evidence did not tend to establish Rivera's bias, prejudice or motive for testifying against defendant.

Thus, the trial court's ruling prohibiting inquiry into this collateral subject matter was not an abuse of discretion.

Alternatively, any error was harmless beyond a reasonable doubt in light of the facts of the case. No weapon was ever found in connection with the murder. It was undisputed that the victim died from a gunshot wound to the head. Rivera's experience owning, shooting, cleaning, or discussing guns would have had nothing whatsoever to do with the questions for the jury to decide.

Rivera's credibility as an eyewitness would not have been undermined by evidence that he knew more than he claimed to know about some guns or by evidence that he may have owned a gun – an inference from a statement about lending a gun to "Neo." The probative value of the alleged impeachment evidence was far from compelling. It is highly unlikely that this evidence would have cast serious doubt on Rivera's testimony about the murder he witnessed. Accordingly, reversal is unwarranted.

II. The court did not abuse its discretion by improperly admitting the deceased's hearsay statements.

A. Standard of review

As a preliminary matter, the substance of this claim is unclear from the Opening Brief. The heading refers only to a claim that the trial court abused its

discretion by admitting the deceased's hearsay statements. (Opening brief, p. 10). However, under the heading "Preservation of issue and standard of review" defendant cites People v. Gash, 165 P.3d 779 (Colo. App. 2006), and United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004), and refers to the "confrontation clause" and "confrontation rights" without specifying whether his claim is grounded in the federal or state constitution. (Opening brief, p. 19-20). Similarly, in the concluding paragraph, defendant asserts that admission of the hearsay statements "violated [his] constitutional right to confront." (Id., p. 28).

Defendant's reference to "firmly-rooted" hearsay exceptions and "guarantees of trustworthiness" further suggests that he is attempting to raise a confrontation clause claim. Under Ohio v. Roberts, 448 U.S. 56 (1980), and People v. Dement, 661 P.2d 675 (Colo. 1983), hearsay is admissible if the declarant is unavailable to testify and the statement bears sufficient "indicia of reliability." Roberts, 448 U.S. at 66; Dement, 661 P.2d at 680-81. Reliability can be inferred without more when the hearsay falls within a firmly rooted hearsay exception. Roberts, 448 U.S. at 66; Dement, 661 P.2d at 681. In the absence of a "firmly rooted" exception, the proponent of the evidence must demonstrate particularized guarantees of trustworthiness. Roberts, 448 U.S. at 66.

Because the statements at issue involve casual remarks made to acquaintances, they are non-testimonial. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004) ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.") Non-testimonial hearsay is not subject to exclusion under the federal confrontation clause and is properly analyzed for admissibility under the rules of evidence. Raile v. People, 148 P.3d 126, 130 (Colo. 2006) *citing* Davis v. Washington, 547 U.S. 813 (2006).

At a minimum, neither a state nor a federal confrontation clause claim was preserved. The word "confrontation" does not appear in the portion of the transcript cited by defendant. (v. 4, p. 18-28). Further, defendant cited no law in the body of his argument to support either a state or federal confrontation clause claim. *See* People v. Diefenderfer, 784 P.2d 741, 752 (Colo. 1989) (if a defendant does not support his appellate arguments by citation to authority, an appellate court need not address them); C.A.R. 28 (a)(4)("The arguments shall contain ... citation to the authorities ... relied on"). Thus, this court should decline to review any purported confrontation clause claims.

Accordingly, the only issue properly preserved and argued on appeal is the trial court's exercise of discretion in admitting the deceased's hearsay statements.

Trial courts have a considerable measure of discretion in applying the residual exception to the hearsay rule. People v. Fuller, 788 P.2d 741, 744 (Colo. 1990). A trial court abuses its discretion only when its ruling is manifestly arbitrary, unreasonable, or unfair. People v. Stewart, 55 P.3d 107, 122 (Colo. 2002). If an abuse of discretion is shown, the improper admission of hearsay is subject to a harmless error analysis. People v. Fry, 92 P.3d 970, 980 (Colo. 2004).

B. Facts, law, and argument

1. Claims lack specificity

In this subsection of the Opening Brief, defendant does not provide a single record cite pinpointing where in the **trial transcript** any of the statements of which he complains were admitted.[3] (Opening brief, p. 20-28). An appellate court can decline to rule on claims that are not supported by references to the record or by legal authority. White v. District Court, 695 P.2d 1133 (Colo. 1984). It is the task of counsel to set forth the specific errors, the grounds and supporting facts and authorities therefor. Courts will not search through the record and the briefs to articulate the claims for the parties. Mauldin v. Lowery, 255 P.2d 976 (1953); Westrac, Inc. v. Walker Filed, 812 P.2d 714 (Colo. App. 1991). This court should

[3] Instead, defendant cites to the People's motion to admit the hearsay statements and the pretrial hearing at which the parties litigated that motion.

decline to address defendant's claims regarding the allegedly erroneous admission of the victim's hearsay statements. Alternatively, upon review of the relevant portions of the record, the People attempt to address what are, presumably, the statements complained of.

2. CRE 807

The five prerequisites to admissibility under CRE 807 are that: the statement is supported by circumstantial guarantees of trustworthiness; the statement is offered as evidence of material facts; the statement is more probative on the points for which it is offered than any other evidence which could be reasonably procured; the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence. Fuller, *supra*.

The circumstantial guarantees of trustworthiness must be established by the proponent by a preponderance of the evidence. People v. Preciado-Flores, 66 P.3d 155, 164 (Colo. App. 2002). "In considering the trustworthiness of a statement, 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." People v. Jensen, 55 P.3d 135, 141 (Colo. App. 2001).

A court is not bound by the rules of evidence in making preliminary determinations concerning the admissibility of evidence. *See* CRE 104(a); *see also* CRE Rule 1101(d)(1) (rules of evidence do not apply to the "determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104").

a. Statements to Mario Rivera

Rivera testified at trial that the victim told him that the cocaine police found in the victim's house belonged to defendant and was worth $30,000. (v. 10, p. 59-60). At a pretrial hearing, the trial court determined that this statement was admissible under CRE 807. (v. 4, p. 32). The court found that the statement had sufficient guarantees of trustworthiness – especially because cocaine was found in the victim's home. (Id.). Defendant claims that trial court erred in finding that the statement had circumstantial guarantees of trustworthiness because the statements were "self-serving." (Opening brief, p. 21-22).

At the pretrial hearing, the prosecutor argued that the statement had adequate circumstantial guarantees of trustworthiness, including: (1) multiple witnesses corroborating where the cocaine was found, (2) testimony of Juan Garcia that he

and defendant went to the victim's house the day after the drugs were seized and defendant directed Garcia to look in the places where police found the drugs, and (3) other statements by the deceased that he was afraid of defendant right after the drugs were seized. (v. 4, p. 25-27). Additionally, the prosecutor argued that because statement also incriminated the victim it was not self-serving. (Id., p. 27).

Defendant's claim that the statement was self-serving (because the victim faced felony drug charges) fails because the statement does not exonerate the victim from criminal liability for possession of $30,000 worth of cocaine. In fact, the statement is strong evidence that the victim knowingly possessed the drugs.

Similarly, defendant's argument that the trial court erred by relying on the fact that drugs were found in the victim's home must fail in light of additional circumstantial guarantees of trustworthiness found in Juan Garcia's testimony. Garcia testified based on his personal knowledge that: (1) defendant was the victim's cocaine supplier, (2) the victim sold 2 or 3 kilos a week (valued at $18,000 per kilo) for defendant, and (3) the day after the drugs were seized, the victim called Juan Garcia and told him to meet defendant at the victim's house to check for the drugs – and defendant directed Juan Garcia to look in the same locations where the police found the drugs. (v. 10, p. 253-254, 260-263). In fact, during the discussion of the admissibility of Juan Garcia's testimony, the trial court

noted, "$30,000 comes back into play here, and makes more sense when you tie the two together." (v. 4, p. 34).

Juan Garcia's testimony provided sufficient circumstantial guarantees of trustworthiness for the admission of the victim's statement to Mario Rivera indicating that the drugs belonged to defendant and were worth $30,000. Thus, the trial court did not abuse its discretion by admitting the statements under CRE 807.

b. Statements to Juan Garcia

Defendant first complains of Juan Garcia's testimony regarding the victim's and defendant's history of dealing drugs together. (Opening brief, p. 23). As pertinent to the hearsay claim, Juan Garcia testified that the victim told him that: (1) he had been getting cocaine from defendant since 2000, (2) he would sell 2 or 3 kilos per week for defendant, (3) the most he ever sold was 5 kilos, (4) the cocaine cost $18,000 per kilo, and (5) he would sell it for $25,000. (v. 10, p. 252-254).

Additionally, Juan Garcia testified that he personally witnessed: (1) the victim and defendant in the victim's kitchen with cocaine (on one to three separate occasions), (2) the victim and defendant with scales and bags, weighing the cocaine and "packing it up in little bags," and (3) the victim giving defendant a bag containing $30,000 to $40,000 in cash. (v. 10, p. 254-260).

Defendant claims that the victim's hearsay statements did not possess sufficient guarantees of trustworthiness because Juan Garcia "admitted dealing cocaine himself, which calls into question both his motive to testify and the reliability of his testimony." (Opening brief, p. 23).

The proper inquiry to determine the admissibility of the victim's hearsay, however, is whether there are circumstantial guarantees of trustworthiness at the time the statement was made. The statement at issue is the victim's admission to Juan Garcia that he was dealing cocaine with defendant. The statement is a statement against penal interest, as the victim incriminated himself as a drug dealer. The statement was made to the victim's brother, and there is no indication that the victim had any sort of motive to lie to his brother about dealing drugs with defendant. Finally, Juan Garcia's personal knowledge of the victim and defendant packaging cocaine and exchanging \$30,000 – \$40,000 in cash corroborates the trustworthiness of the statement at issue. Thus, the trial court did not abuse its discretion by finding this statement admissible under CRE 807.

Next, defendant complains of the victim's statements to Juan Garcia regarding the victim's wife, Gloria Madera. (Opening brief, p. 23). During Juan Garcia's testimony, the following exchange occurred:

Prosecutor:	Do you then call [the victim] and report to him, didn't find any drugs?
Witness:	I call [the victim], there's no drugs, we didn't find any drugs.
Prosecutor:	And does he have a reaction about Gloria?
Witness:	Like, fucking bitch.
Prosecutor:	Just say what he said about Gloria.
Witness:	Fucking bitch, she ratted on me.
Prosecutor:	Okay. You told him you didn't find the drugs, and he's mad about Gloria turning him in, is that correct?
Witness:	Yes.

(v. 10, p. 264). Shortly thereafter, this exchange occurred:

Prosecutor:	Does [the victim] also talk to you about – you mentioned what he said about Gloria, did he ever say anything about what Gloria may have said as it relates to [defendant]?
Witness:	Well [the victim] was pissed, because he was mad because they found the drugs and she mentioned [defendant]'s name.
Prosecutor:	That is [the victim]'s understanding that Ms. Madera had also talked about [defendant]?
Witness:	Excuse me?
Prosecutor:	When you talked to [the victim], [the victim] had said something about, using his words, that bitch turned me in and mentioned [defendant] in there, too?
Witness:	Yes.

(Id., p. 266).

Defendant claims that the statements should not have been admitted because Gloria Madera never testified that she mentioned defendant to police. (Opening brief, p. 24). Defendant does not articulate how admission of this evidence operated to undermine the fundamental fairness of the trial. Indeed, defendant concedes that the evidence was irrelevant to the material issues in this case. Moreover, the statement at issue was double hearsay – the victim telling Juan Garcia what Madera told police – thus the declarant of the substantive statement (Madera's mention of defendant to police) was available for cross-examination. Accordingly, any error was harmless.

Finally, defendant objects to the admission of statements made to Juan Garcia by the victim, implicating defendant if the victim should ever end up missing. (Opening brief, p. 24). During Juan Garcia's testimony, the following exchange occurred:

> Prosecutor: Let me ask you this: Is there a time that [the victim] has a conversation with you – actually on more than one occasion about if he ever went missing, who you should look at?
>
> Witness: He had called me quite a few times and told me, Juan, if I ever disappear, if I go missing, it was [defendant].

(v. 10, p. 273). Garcia also testified that the victim started saying this back in 2004, before defendant's drugs were seized from the victim's home. (Id.).

Defendant claims that admission of this evidence is reversible error because the trial court failed to make a finding on the record that the hearsay statement had sufficient guarantees of trustworthiness. (Opening brief, p. 24). The failure of a trial court to make findings is harmless if the hearsay statements meet the requirements for admissibility under CRE 807. Fuller, 788 P.2d at 745.

Here, the record contains adequate circumstantial guarantees of trustworthiness, in the form of defendant's numerous threats to kill the victim. In particular, Juan Garcia heard the victim tell defendant that he would turn defendant in if "something happens." (v. 10, p. 268-269). Garcia heard defendant respond, "if you rat on me, I will kill you, I will put a bullet through your head." (Id.). On another occasion, Garcia heard defendant tell the victim, "If you're [wearing a wire], I'm going to kill you." (Id., p. 271). Finally, after the defendant threatened to kill Madera and the victim protested, defendant said, "Somebody has to die, either you or her, somebody has to go." (Id., p. 272).

Additionally, the victim's sister, Ilda Garcia testified that on Christmas Eve of 2004, she asked the victim how much he owed defendant, and the victim told her, "I don't owe him anything, but he wants me to kill Gloria for the drugs, or if [I

don't] kill Gloria, then he would kill me." (Id., p. 79). Thus, any deficiency in the trial court's findings as to the victim's statement implicating defendant if the victim ever "went missing" is harmless.

c. Statements to Ilda Garcia

During Ilda Garcia's testimony, the prosecutor asked if Ilda was aware of where the victim got his drugs. (v. 11, p. 75). Ilda stated, "he got them from [defendant]." (Id.). Additionally, as detailed above, the victim told Ilda that defendant wanted to kill Gloria for the drugs, and if not Gloria, then defendant would kill the victim. (Id., p. 79).

Defendant claims that this hearsay testimony was improperly admitted because there was "no corroboration of the alleged threat by the defendant." (Opening brief, p. 26). This claim fails in light of Juan Garcia's testimony recounting his personal knowledge of defendant threatening to kill both Madera and the victim. Any alleged deficiencies in the trial court's findings in support of the admission of the statements is therefore harmless.

d. Statements to Mary Garcia

Defendant complains that testimony by Mary Garcia that the victim told her that he was "scared for his family" was inadmissible because it lacked adequate corroboration. (Opening brief, p. 27).

Juan Garcia's testimony, recounting a conversation between defendant and the victim, provides sufficient guarantees of trustworthiness for Mary Garcia's testimony. Specifically, Garcia testified that he was present when defendant said to the victim, "We have to kill her, you know." (v. 10, p. 271). The victim said, "No, don't fuck with my family." (Id.). Defendant responded, "It's a green light," and victim said, "No, no, no." (Id.). Defendant then said, "Somebody has to die, either you or her, somebody has to go." (Id., p. 272). Juan Garcia also testified that defendant talked about doing a drive-by at Gloria's mother's house. (Id.).

Thus, defendant's own statements threatening the victim's family provide sufficient corroboration for the victim's hearsay statement regarding his fear for his family, and the statement was properly admitted under CRE 807.

III. The court did not abuse its discretion by improperly admitting evidence of other acts under CRE 404(b).

A. Standard of review

The People agree that admission of evidence under CRE 404(b) is reviewed for an abuse of discretion. *See* Masters v. People, 58 P.3d 979, 996 (Colo. 2002).

B. Law and argument

1. Claims lack specificity

As in Argument B in the Opening brief, defendant again fails to provide a single record cite pinpointing where in the **trial transcript** any of the evidence of

which he complains was admitted.[4] (Opening brief, p. 29-31). An appellate court can decline to rule on claims that are not supported by references to the record or by legal authority. White, *supra*. It is the task of counsel to set forth the specific errors, the grounds and supporting facts and authorities therefor. Courts will not search through the record and the briefs to articulate the claims for the parties. Lowery, *supra*; Walker Filed, *supra*. This court should decline to address defendant's claims regarding the allegedly erroneous admission of evidence of defendant's prior acts. Below, the People limit their response to the statements specifically referenced in the Opening Brief.

2. Prior acts evidence

Defendant complains of Juan Garcia's testimony regarding his personal knowledge of several statements by defendant threatening to kill the victim and the victim's wife. (Opening brief, p. 30-31; v. 10, p. 265-272). Prior to any of the testimony at issue, the trial court read a limiting instruction to the jury. (v. 10, p. 252).

The trial court ruled that the evidence was admissible under CRE 404(b) to show the alleged motive for the shooting, and that the evidence was probative of

[4] Instead, defendant cites to the People's notice of intent to introduce other acts evidence and the pretrial hearing at which the parties litigated that motion.

defendant's knowledge and identity. (v. 10, p. 13). The court concluded that any weaknesses in the evidence affect its weight, not its admissibility. (Id.).

Defendant contends the evidence was "highly inflammatory" and was introduced "not to show motive, but to paint the defendant as a bad character." (Opening brief, p. 31). He further claims that the danger of unfair prejudice substantially outweighed the probative value of the evidence. (Id.).

CRE 404(b) provides that 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. But such evidence may be admissible for purposes other than showing criminal propensity, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. CRE 404(b). In all cases, before admitting evidence of other crimes or bad acts, the trial court should determine that: (1) the proffered evidence is logically relevant to a material fact; (2) the logical relevance is independent of the intermediate inference that the defendant has a bad character; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. People v. Spoto, 795 P.2d 1314, 1318 (Colo. 1990).

Defendant appears to be challenging the fourth prong of the Spoto test, which is a restatement of CRE 403. Rule 403 strongly favors the admission of

evidence. The "unfair prejudice" language contained in Rule 403 refers to an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis. Unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger or shock. Unfair prejudice as used in Rule 403 does not mean the damage to a defendant's case that results from legitimate probative force of the evidence. People v. District Court of El Paso County, 869 P.2d 1281, 1286 (Colo. 1994).

In a homicide trial, evidence of prior threats, mistreatment, or malice by defendant toward the victim is admissible to show defendant's motive and culpable mental state. People v. Jensen, 55 P.3d 135, 140 (Colo. App. 2001). Under the facts of this case, the record supports the trial court's admission of the evidence of defendant's threats to kill the victim and the victim's wife.

IV. Cumulative error does not require reversal.

A. Standard of review

Whether the cumulative effect of error is sufficiently prejudicial to warrant a new trial is reviewed *de novo*. People v. Rincon, 140 P.3d 976, 984 (Colo. App.

2005). No objection was made in the trial court that the defendant's constitutional rights were being violated by cumulative error.

B. Law and argument

As discussed under separate argument headings here, no error has been shown. Where a defendant's individual contentions of error have been rejected, no reversal is required under the doctrine of cumulative error. *See* People v. Gordon, 32 P.3d 575, 581-582 (Colo. App. 2001). The cumulative effect of any error did not deny the defendant a fair trial.

CONCLUSION

For the foregoing reasons and authorities, defendant's conviction and sentence should be affirmed.

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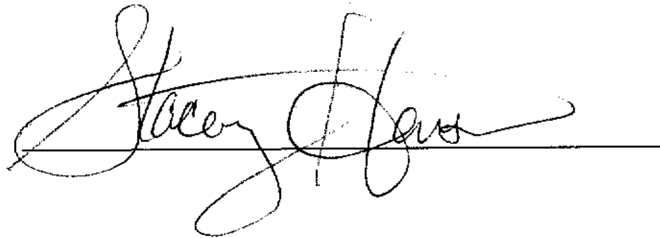
<u>CERTIFICATE OF SERVICE</u>

This is to certify that I have duly served the within ANSWER BRIEF upon Blain D. Myhre, by placing copies of the same in the U.S. Mail to the address listed below this __14th__ day of _November_____2008.



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