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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East Fourteenth Avenue, Suite 300 Denver, Colorado 80203	
Appeal from the District Court, City and County of Denver, Colorado Honorable Martin F. Egelhoff, District Judge Case No. 06 CR 10408, Courtroom 11	**▲ COURT USE ONLY ▲**
Plaintiff-Appellee: **THE PEOPLE OF THE STATE OF COLORADO** **Defendant-Appellant:** **MARTIN VILLANUEVA**	Case No.: 2007CA858
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OPENING BRIEF

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I. Statement of the issues

1. The trial court denied Villanueva's right to confront by refusing to allow defense counsel to impeach the prosecution's key witness with prior statements that were inconsistent with his trial testimony.

2. The trial court abused its discretion in admitting hearsay statements of the victim at trial, as those statements were not admissible under any hearsay exception.

3. The trial court abused its discretion in admitting inflammatory, prejudicial evidence under CRE 404(b).

4. The cumulative effect of the trial court's errors violated Villanueva's right to a fair trial and warrants a new trial.

II. Statement of the case

A. Nature of the case, course of proceedings, and disposition below

Martín Villanueva appeals his conviction for first-degree murder for the death of Benjamin Garcia-Diaz ("Garcia"). The prosecution case hinged on the testimony of Mario Rivera, who claimed to have seen Villanueva shoot Garcia. During cross-examination of Rivera, the defense was denied the ability to impeach him. But the prosecution, throughout the course of trial, was allowed to introduce numerous hearsay statements of the victim and substantial CRE 404(b) evidence.

Villanueva was charged with first degree murder after deliberation, in violation of C.R.S. § 18-3-102(1)(a). 1 R. at 1-2. He was tried before a jury, which convicted him of first-degree murder. 2 R. at 336. Villanueva was sentenced to life in prison without the possibility of parole. *Id.* at 339. He timely appeals.

B. Statement of the Facts

It is undisputed that on the evening of March 26, 2005, Garcia, Villanueva, Villanueva's brother Ignacio (nicknamed "Nacho"), Sergio Gonzales (nicknamed "Guerro"), and Mario Rivera went to La Sierra, a bar in Aurora. Later in the evening, all five went to Las Tres Potrancas, a bar in Denver. 16 R. at 26:1-6, 42:18-20, 56:18-24, 314:10-12, 316:11-17, 319:8-12, 320:4-7; 10 R. at 7:3-20, 11:14-25.[1]

Around 2 a.m. (March 27, 2005, which was Easter Sunday), Garcia, Villanueva, Ignacio, and Rivera (and possibly Gonzales) went to a 7-11 gas station/convenience store at 38th and Lipan in Northwest Denver. Villanueva, Garcia, and Rivera each drove their own vehicles. 10 R. at 12:9-15, 14:11-20, 277:18-278:4; 11 R. at 14:13-15:3; 16 R. at 120:9-12. Surveillance video showed

[1] References to the transcript are to the volume number. Though the transcript volumes are separately numbered, they are not all numbered in chronological order.

Rivera and Garcia entering the store shortly after 2 a.m. *See* Ex. 239 (DVD of surveillance video).

The prosecution and defense theories diverge at this point. According to the prosecution (based on Rivera's testimony), Villanueva (along with Ignacio), Garcia, and Rivera each drove to the Villanueva family house on Jason Street. 10 R. at 19:22-21:4. Rivera testified that Villanueva and Garcia parked their cars on one side of the street and he parked on the other. *Id.* at 21:25-23:15. Rivera testified that he got out of the car and went to the driver's side window of Garcia's Ford Expedition to get a cigarette. Garcia was in the driver's seat of the Expedition. *Id.* at 26:6-19.

Rivera said that Villanueva went into the locked lot next door to the family home—where cars and various tools were stored—and came back with a CD case. 10 R. at 28:1-29:11, 31:4-12; 13 R. at 148:11-24. Rivera said that Villanueva approached the driver's side of the Expedition. 10 R. at 31:4-8. According to Rivera, Villanueva brought the CD case down, then brought up a gun, holding it in his left hand. *Id.* at 33:23-25, 47:14-15. (Speaking to the police, Rivera had on previous occasions said that the gun had been in the right hand. He also previously testified that it had been in the left hand. *Id.* at 47:19-48:3, 78:7-22.) Rivera said Villanueva shot Garcia. *Id.* at 34:3-9. He said the bullet went from Garcia's left

temple and exited over his right ear (a front-to-back trajectory), and that the bullet went into the back of the truck. *Id.* at 75:10-76:13. The coroner testified, however, that the trajectory was back-to-front and possibly slightly downward or horizontal. 16 R. at 162:4-8. The coroner's testimony contradicted Rivera's testimony about the bullet path.

Rivera testified that after the shooting, he went back to his car and drove away. 10 R. at 46:8-47:5. No physical evidence was recovered at the alleged crime scene—no bullets, no bullet casings, no gunshot residue, no blood, or other physical evidence. 12 R. at 162:6-167:7. No gun was recovered.

In contrast to Rivera's and the prosecution's version of events, the defense case showed that after leaving the 7-11, everyone went their separate ways. *See* 13 R. at 170:1-171:23. Ignacio Villanueva testified that after 7-11, he and his brother returned to the family home. No one accompanied them to the family home. *Id.* Shortly thereafter, Ignacio drove to his own home to check on his nephew who lives with him. *Id.* at 159:6-13, 173:2-5.

Despite Rivera's testimony that Villanueva shot Garcia, none of the neighbors heard any gunshot. 13 R. at 57:7-58:18, 69:8-70:23, 88:6-7, 91:14-92:6,

100:10-16, 109:18-23, 119:3-25, 126:1-2, 128:13-19.[2] Laurie Vargas testified that she heard a loud noise, but it was like "the trains hit too hard or a circuit or something." 14 R. at 16:10-25. She said it was not like a gunshot. *Id.* at 20:8-14. She also testified that the noise she heard was not on Easter Sunday, but instead early the following morning (March 28). *Id.* at 21:11-22:7. No one heard cars squealing or anything unusual. 12 R. at 169:4-16. No witnesses other than Rivera place Garcia at the Jason Street location. No witnesses other than Rivera place Garcia and Villanueva together after the 7-11.

Around 7 a.m. on the morning of March 27, a train engineer driving a train through Weld County reported seeing a car on fire. 16 R. at 173:8-174:17, 187:8-14. It was later determined that the burning car was Garcia's Ford Expedition. Garcia, however, was not found inside. Instead, in September 2005, Garcia's body was found by a passing hunter about 8 miles from where the Expedition had been found. 16 R. at 126:10-25, 128:15-20, 139:6-8.

After Garcia's body was found, Villanueva was charged with first-degree murder, C.R.S. 18-3-102(3)(1)(a). I R. at 1-2. In pretrial motions, the People sought to admit numerous hearsay statements of Garcia. *See* I R. at 18-28. The

[2] Neighbors testified, however, that they did hear gunshots fired during a court-approved re-enactment conducted in November 2006 by the defense. *See, e.g.,* 13 R. at 92:7-18, 130:12-15, 140:21-23, 142:6-24; 14 R. at 14:19-15:16, 20:6-14.

People also gave notice of intent to introduce "other acts or transactions" evidence under CRE 404(b) or as *res gestae* evidence. 1 R. at 30-42. At the motions hearing, the motions judge, over defense objection, ruled the People would be able to introduce nearly all of the hearsay statements and the other acts evidence (under Rule 404(b)). *See generally* 4 R. (Transcript of 6/22/06 motions hearing).

At trial, the People put up Mario Rivera as the key witness in the case. On cross-examination, Rivera was asked about his knowledge of guns, and denied much knowledge, ownership, or use of guns. *See* 10 R. at 82:25-84:21. The defense had audiotapes of conversations between Rivera and Yrineo "Neo" Arias, who had secretly taped his conversations with Rivera. After Rivera's denials on cross-examination, defense counsel asked to approach, and advised the court it wished to play snippets of those audiotapes that would impeach Rivera. *See id.* at 84-101, 104-05, 109-12. The People objected, and the court, while acknowledging that Rivera was "the crucial witness" in the case, ruled that it would not allow defense counsel to play the tapes or to even ask Rivera about the conversations. *Id.* at 100-01, 102-03, 112-14. Because of the court's ruling, defense counsel was not able to cross-examine Rivera about the conversations and impeach his earlier testimony.

In closing arguments, the People highlighted Rivera's testimony and the evidence the People claimed supported it. *See, e.g.*, 14 R. at 98:3-106:13, 144:18-145:3, 147:3-149:18. The People focused on the credibility of Rivera as being critical to their case.

The jury convicted Villanueva of first-degree murder. 2 R. at 336. The court sentenced Villanueva to life without the possibility of parole. 2 R. at 339. Villanueva timely appealed.

III. Summary of the Argument

The trial court denied Villanueva's confrontation rights by not allowing defense counsel to impeach Mario Rivera, the prosecution's star witness, with statements inconsistent with his trial testimony. While a trial court has the authority to impose some limits on cross-examination, where the limits imposed prevent a criminal defendant from using cross examination to explore the bias or prejudice of a witness against him, the requirements of the Sixth Amendment are not met. The statements here were impeaching and therefore the denial of the use of them violated Villanueva's right to confront Rivera. A new trial is required because the denial of Villanueva's confrontation rights was not harmless beyond a reasonable doubt.

The trial court also erred in allowing numerous hearsay statements by Garcia. Those statements should not have been admitted under either the residual hearsay exception (CRE 807) or the state of mind exception (CRE 803(3)). For the statements erroneously admitted under the residual hearsay exception, the admission of those violated Villanueva's confrontation rights, since the residual hearsay exception is not a firmly-rooted hearsay exception. The admission of the statements, regardless of the basis for admitting them, was not harmless error because the statements were highly inflammatory and prejudicial, and this was not a case of overwhelming evidence against the defendant.

The trial court also erred in admitting "other acts" evidence under CRE 404(b). The evidence did not satisfy the *Spoto* analysis. The evidence was highly inflammatory, introduced not to show motive, but to paint the defendant as a bad character. The probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and therefore its admission was error. The error was not harmless because of the unfairly prejudicial effect of the 404(b) evidence on the case, especially in light of the fact that there was not overwhelming evidence of guilt.

Finally, the cumulative effect of the trial court's errors deprived Villanueva of his right to a fair trial. Under the cumulative error doctrine, a new trial is required.

IV. Argument

A. The trial court denied Villanueva his constitutional right to confront by not permitting the defense to impeach the key prosecution witness, Mario Rivera.

1. Preservation of issue and standard of review

During cross-examination, defense counsel asked Rivera a series of questions about his knowledge of and experience with guns. 10 R. at 82:25-84:21. Once Rivera answered the questions, counsel asked to approach and informed the court it wished to impeach Rivera with audiotaped conversations between Rivera and Yrineo "Neo" Arias, which included statements from Rivera inconsistent with his trial testimony. *Id.* at 85:13-86:3, App. 1-2. Defense counsel advised the court it was seeking to use the statements for impeachment purposes, and would lay the foundation for the statements by asking Rivera about the conversations. 10 R. at 94:16-22, App. 6; *see also* 10 R. at 110:5-112:19, App. 19-21. The prosecution objected to the use of the statements. 10 R. at 89:17-90:25, 100:4-101:18, App. 12-13. The court did not permit defense counsel to use the tapes or even the transcripts of the tapes, despite counsel's request to be allowed to impeach Rivera.

10 R. at 102:1-103:25, 114:4-12, App. 14-15, 23. By asking to use the conversations to impeach Rivera, defense counsel preserved the issue for appeal.

A trial court has the authority to impose some limits on cross examination, but where the limits imposed prevent a criminal defendant from using cross examination to explore the bias or prejudice of a witness against him, the requirements of the Sixth Amendment are not met. *People v. Cobb*, 962 P.2d 944, 950 (Colo. 1998). Thus, while the admission or exclusion of prior inconsistent statements to an impeach a witness is ordinarily reviewed for abuse of discretion, *see People v. Jenkins*, 768 P.2d 727, 730 (Colo. App. 1988), it is error of constitutional magnitude to prevent a criminal defendant from using cross examination to explore bias or prejudice of a witness. *See Cobb*, 962 P.2d at 950; *see also People v. Golden*, 140 P.3d 1, 6 (Colo. App. 2005) (error in exclusion of impeaching evidence diminished defendant's exercise of his confrontation rights and therefore the error was of constitutional magnitude).

2. The trial court denied Villanueva's confrontation rights by not allowing defense counsel to impeach Mario Rivera.

Mario Rivera was the key prosecution witness, allegedly an eyewitness who saw the crime occur. The prosecution case rested on his testimony. Thus, his credibility was a central issue to both the prosecution and defense.

Rivera testified that he saw Villanueva shoot Garcia. He was the only witness who so testified. He was also the only witness who placed Villanueva and Garcia together after they left the 7-11.

On direct, Rivera claimed he saw Villanueva produce a gun that was a dark metallic color. Rivera said the gun was "an automatic" not a revolver, but he could not say what kind of gun it was. 10 R. at 34:12-14, 40:1-3. On cross-examination, however, he admitted that he had previously told a detective that the gun was a 9 millimeter. *Id.* at 71:18-22.

Defense counsel asked Rivera a series of questions about his knowledge of and experience with guns:

Q. Do you have any working knowledge of 9 millimeters?

A. No, I don't.

Q. Have you owned a gun?

A. No, I don't.

Q. Did you shoot a 9 millimeter gun?

A. Yes.

Q. Who did it belong to?

A. My friends.

Q. And was that on a single occasion?

A. I think it was a couple of times.

Q. But you yourself never owned a gun?

A. No, never.

. . . .

Q. Have you ever owned a revolver?

A. No.

Q. Never owned a gun of any type?

A. No.

Q. Never had a gun of any type, I gather?

A. I've shot guns, but never owned.

Q. Never had one that was yours?

A. No.

Q. Now, have you ever worried about having your fingerprints on guns?

A. No.

Q. Have you ever talked to anybody about having your fingerprints on guns?

A. No.

Q. This 9 millimeter, did it have a banana clip?

A. Yes.

Q. And so you know what a banana clip is?

A. Yes.

Q. And have you ever worked on guns?

A. No, I don't know.

Q. Ever taken a 9 millimeter apart?

A. No.

Q. Ever changed barrels, anything like that?

A. No.

10 R. at 82:25-84:21.

At this point, defense counsel asked to approach and told the court, "I'm about to examine Mr. Rivera, and depending on the answers he gave about conversations with the gentlemen named Neo, I may play some snippets of those conversations with him." 10 R. at 85:3-6, App. 1. The prosecutor said that she had not heard the conversations. The court asked if defense counsel was going to confront Rivera with prior statements. Defense counsel said he was "going to confront him with statements . . . made in conversations with the man that has been testified to as Neo." 10 R. at 85:20-23, App. 1. Defense counsel noted the statements were inconsistent "with regard to his knowledge of guns, his ownership of guns, etc." 10 R. at 86:1-3, App. 2. The court indicated, "that sounds like

impeachment information," and told counsel to disclose it to the prosecution. 10 R. at 86:4-6, App. 2.

After giving the prosecution the chance to review transcripts of the statements, a discussion ensued during which the court asked defense counsel what it was going to do. Counsel indicated he would play a series of clips that talk about Rivera's ownership and control over weapons, about wiping fingerprints off of weapons, about changing barrels of a weapon, so as not to be caught. 10 R. at 92:14-24, App. 4. Counsel noted that the testimony went to Rivera's credibility, and said "what I did before the break was laid [sic] the foundation to then ask whether or not [Rivera] had these conversations, did [he] affirm that [he] had this weapon, that [he] lent it Neo, that [he] took it back, things like that. If he denied the conversation, it would be my position and intention to play the tape where we have the two of them." 10 R. at 93:5-11, App. 5.[3] (Attached to this brief are the

[3] Defense counsel also noted that there was another snippet that referenced Garcia's drug trafficking. 10 R. at 93. On direct, Rivera had testified that he had knowledge of the relationship between Garcia and Villanueva as it related to drug dealing. Rivera testified that he knew they both dealt drugs and said that Villanueva supplied Garcia. *Id.* at 58. At the bench conference on the taped conversations, defense counsel noted that in one conversation Rivera said that Garcia was a source of drugs but that his "connection" was not Villanueva. *Id.* at 93-94. That statement directly contradicted Rivera's testimony on who Garcia's drug source was, and thus also impeached Rivera.

portions of the trial transcript where counsel read into the record the transcripts of the impeaching statements. *See* App. 7-8, 10-12, 16-17.)

The court concluded that the statements were not particularly impeaching. *See* 10 R. at 102:11-18, App. 14. The court also said that the information was "extraordinarily prejudicial." 10 R. at 103:11-16, App. 15. The court therefore concluded that the impeachment value was substantially outweighed by the unfair prejudice and confusion of the issues. 10 R. at 103:17-23, App. 15.

In concluding the statements were not particularly impeaching, the court ignored or failed to recognize the direct contradictions with Rivera's testimony about guns, particularly his knowledge of guns and ownership of guns. Since Rivera was the key prosecution witness, impeachment of his credibility was critical to the defense, and the trial court erred in disallowing it.

After the court refused to allow defense counsel to play the tapes, counsel asked whether the court would allow him to question Rivera about the conversations with Neo. The court would not allow that either. 10 R. at 104:2-10, App. 16. Thus, in addition to excluding the tapes, the court did not even allow simple impeachment by use of a transcript of the conversations.

After the lunch break, but before Rivera's testimony resumed, defense counsel again asked the court to allow him to ask questions about Rivera's

conversations with Neo. 10 R. at 110:11-111:8, App. 19-20. Counsel noted that the statements would impeach Rivera's testimony "that he did not own a gun, that he had never worked on a gun, never taken a gun apart." 10 R. at 111:22-112:4, App. 20-21. But the trial court again refused to allow the defense inquiry. *See* 10 R. at 114:2-10, App. 16. The court's refusal to permit impeachment of Rivera violated Villanueva's confrontation rights under the Sixth Amendment and under article II, section 16 of the Colorado Constitution. *See Cobb* and *Golden, supra.*

In one of the audio tracks that would have been played, Rivera says, "Like *on my gun*, if they find a gun on you, fool, all you got to – like if you shoot somebody and you shoot the gun, they – they want the gun. You don't have to get rid of the gun. *All you got to do – all you got to get rid of is the barrel, because that's what makes the mark on the bullet, the barrel.*" 10 R. at 99:8-13: App. 11 (emphasis added). In another track, Rivera says "Each barrel, dude, is different, each barrel is different, makes a different mark on a bullet." 10 R. at 99:21-23, App. 11. On cross-examination, Rivera denied having a working knowledge of guns, denied owning guns, denied ever working on guns, and denied changing barrels on guns. Rivera's audiotaped statements impeach those answers, and should have been allowed.

To the extent the trial court was concerned about any unfair prejudice, the court could have let defense counsel ask questions based on the transcripts of the statements, without allowing the actual tracks to be played. But the court shut the door on any impeachment whatsoever. That was reversible error, as it denied Villanueva his right to confront Rivera. *See Cobb*, 962 P.2d at 950; *Golden*, 140 P.3d at 6-7.

In *Golden*, this court reversed a sexual assault conviction because the trial court erroneously excluded impeachment evidence under the rape shield statute. This court determined that the victim's prior inconsistent statements acknowledging a committed romantic relationship was an inquiry that "would have called into question her credibility and her possible motive in telling her roommates that she had been sexually assaulted." 140 P.3d at 6. It therefore was a permissible inquiry on cross examination. The denial of that inquiry violated the defendant's confrontation rights. *See id.*

In *Cobb*, the supreme court upheld this court's reversal of a sexual assault conviction because the trial court denied defendant's confrontation rights. Similar to the instant case, there were two versions of events in *Cobb*, the victim's and the defendant's. The credibility of the victim was thus central to the case. As a sanction, the trial court had prohibited the defense from calling a police officer to

testify about an encounter with the victim that occurred nine days before the incident with the defendant. The officer's testimony would have impeached the victim's credibility. This court reversed and the supreme court affirmed.

The supreme court said, "A trial court has the authority to impose some limits on cross examination, but where the limits imposed prevent a criminal defendant from using cross examination to explore the bias or prejudice of a witness against him, the requirements of the Sixth Amendment are not met. *See Merritt v. People*, 842 P.2d 162, 166-68 (Colo. 1992). In order to obtain a new trial, [the defendant] need not show that the limits on cross examination would have changed the outcome, but rather that the ruling preventing him from challenging [the victim's] credibility was not harmless beyond a reasonable doubt." 962 P.2d at 950, citing *Arizona v. Fulminante*, 499 U.S. 279, 312 (1991).

Here, the result of the trial court's ruling was to completely shut down proper impeachment of the key prosecution witness. Defense counsel had elicited testimony that was inconsistent with the statements Rivera made in the conversations with Neo. To not allow defense counsel to play the snippets or even to ask about the conversations denied Villanueva his constitutional right to confront Rivera. If the confrontation clause means anything, it means that defense counsel gets to impeach the credibility of an eyewitness who identifies the

defendant as committing the criminal act charged. *See Cobb*, 962 P.2d at 950. The trial court's error in not permitting the impeachment of Rivera thus denied Villanueva his right of confrontation under the Sixth Amendment and under article II, section 16 of the Colorado Constitution.

Because the error was of constitutional magnitude, it is reversible error unless the error was harmless beyond a reasonable doubt. *See Cobb*, 962 P.2d at 950, *Golden*, 140 P.3d at 6-7. In *Cobb*, the supreme court said, "where the defendant is not permitted to confront the main witness against him at trial, a new trial is required . . . ." 962 P.2d at 950. Here, the trial court excluded impeachment of the alleged eyewitness to the crime. Without Rivera's testimony, the prosecution had no case. Therefore, the error was not harmless beyond a reasonable doubt, and under *Cobb*, Villanueva is entitled to a new trial.

B. The trial court abused its discretion in allowing hearsay statements of Garcia to be admitted at trial.

1. Preservation of issue and standard of review

The prosecution filed a pretrial motion to admit hearsay statements of Garcia. *See* 1 R. at 18-28. At a pretrial hearing, defense counsel objected to the admission of all the statements, but the motions judge ruled that most of the hearsay statements were admissible. *See* 4 R. at 20-43. The issue was therefore preserved for appeal.

The trial court admitted some statements under the state of mind exception, CRE 803(3), and others under the residual hearsay exception, CRE 807. *See id.* Evidentiary rulings on hearsay statements are reviewed for abuse of discretion. *See, e.g, People v. Preciado-Flores*, 66 P.3d 155, 164 (Colo. App. 2002); *People v. Welsh*, 176 P.3d 781, 790 (Colo. App. 2007). For Confrontation Clause purposes, though, the state-of-mind exception is a firmly-rooted hearsay exception, while the residual hearsay exception is not. *See People v. Gash*, 165 P.3d 779, 789 (Colo. App. 2006) (state of mind exception of CRE 803(3) is a firmly-rooted hearsay exception); *United States v. Turning Bear*, 357 F.3d 730, 738 (8th Cir. 2004) (federal residual hearsay exception is not a firmly-rooted exception). Thus, hearsay statements admitted under the residual hearsay exception that do not have guarantees of trustworthiness violate a defendant's confrontation rights. *See Turning Bear*, 357 F.3d at 739.

2. *Hearsay Statements to Mario Rivera*

The first hearsay statement from Garcia to Mario Rivera related to cocaine seized from Garcia's house. 1 R. at 18, App. 26. In December 2004, following a domestic dispute, the police were called to Garcia's house. Once there, Garcia's wife pointed the officers to two places in the house that contained a large amount

of cocaine (about 1.5 kg total). 1 R. at 31. (Garcia later faced a felony charge in connection with that cocaine.)

Garcia allegedly told Rivera that the cocaine found in Garcia's house was Villanueva's and Garcia also said that he owed $30,000 to Villanueva. 1 R. at 18, App. 26. The trial court allowed this statement under the residual hearsay exception, finding that there was sufficient corroborative evidence. That conclusion was error.

Under CRE 807, a hearsay statement not falling under any recognized hearsay exception is admissible if (1) the statement is supported by circumstantial guarantees of trustworthiness; (2) the statement is offered as evidence of a material fact; (3) the statement is more probative on the point 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. *See People v. Fuller*, 788 P.2d 741, 744 (Colo. 1990) (decided under CRE 804(b)(5), which was later transferred to CRE 807).

The trial court erred in finding that the statement had circumstantial guarantee of trustworthiness. The court noted that the "cocaine was found . . . at

the victim's home, and where it was found, how it was found in the course of a lawful search. I think that's corroborative." 4 R. at 32:10-13. The court then concluded that "$30,000, that can get tied to the cocaine at the same time. It's part and parcel of that statement and I think is likewise admissible for the same reason." *Id.* at 32:14-16.

The statement that the drugs were defendant's not Garcia's was self-serving. Because of the seizure of cocaine from his home, Garcia faced felony drug charges. His statement simply shifted blame away from himself. The trial court was incorrect in concluding that how the drugs were found was corroborative of the statement. The drugs were found at Garcia's house when Garcia's wife pointed the police to their locations. That in no way corroborates that the drugs were Villanueva's, nor that Garcia owed Villanueva $30,000. Because the statement did not have circumstantial guarantees of trustworthiness, it was error to admit the statement under CRE 807.

3. Hearsay Statements to Juan Garcia

The People also sought to introduce numerous hearsay statements Garcia made to his brother, Juan Garcia ("Juan"). *See* 1 R. at 19-20, App. 25-26. Many of these statements related to alleged drug dealing. Of 10 statements listed as "bullet points" in the People's motion, the court allowed 8 of the statements. The

court did not make a good record on why it allowed them in, but it is clear that none of those statements relate to Garcia's then-existing state of mind. Therefore, the admission of those statements must rest, if at all, on the residual hearsay rule. But the statements lack guarantee of trustworthiness, and therefore it was error to admit them.

In the statements, Garcia told his brother that he was dealing cocaine with Villanueva. 1 R. at 19, App. 25. According to Juan Garcia, he saw his brother and Villanueva with a large amount of cocaine in the kitchen of Garcia's house. *See* 1 R. at 34, App. 28. While the presence of the cocaine in Garcia's house shows that Garcia was involved in drug trafficking, it does not show that the cocaine was Villanueva's or that Villanueva supplied cocaine to Garcia. Moreover, Juan Garcia admitted dealing cocaine himself, which calls into questions both his motive to testify and the reliability of his testimony. 1 R. at 35, App. 29. Accordingly, the hearsay statements to him do not possess sufficient guarantees of trustworthiness and should not have been deemed admissible under CRE 807.

The People also sought to admit two statements to Juan that related to Garcia's reaction to his wife, Gloria Madera, "turning him in." Garcia allegedly said, "F------ Gloria turned me in and mentioned Martin in there too," and "So you didn't find anything? So that f------ b---- turned me in?" 1 R. at 20, App. 26.

Madera testified at trial, and described her encounter with police, but did not testify that she mentioned Martin Villanueva to the police. *See* 10 R. at 231:14-232:15. Thus, the statements are not corroborated by any evidence and have no guarantees of trustworthiness. (It is also difficult to see what relevance they have to material issues in the case.) Accordingly, it was error to admit them.

Finally, the court allowed two statements Garcia allegedly made to Juan that if he was ever killed, it was defendant who would have done it. *See* 1 R. at 20, App. 26; 4 R. at 39:9-13. The court noted that the statements went to motive and therefore would be allowed. 4 R. at 39:9-13. Defense counsel argued that there was no supporting corroboration for the statement. The court, cryptically, responded that "inferences are evidence, too," and apparently concluded on that basis that there was sufficient corroborating material. *Id.* at 39:14-18. The trial court did not indicate what inferences it was making or relying upon, so the court's findings are inadequate. There is no finding in the record to support a determination that the statement had sufficient guarantees of trustworthiness. The statements thus were not admissible under CRE 807.

To extent the court admitted the statements under the state of mind exception, CRE 803(3), the court abused its discretion. These statements relate to Garcia's alleged fear of Villanueva, and thus address Garcia's then-existing state

of mind. But Garcia's state of mind was not an issue in the case. It was therefore error to admit the statements under the state of mind exception.

In *People v. Madson*, 638 P.2d 18 (Colo. 1981), the supreme court addressed the state of mind exception and the circumstances in which statements of a crime victim showing fear of the defendant may be admitted under that hearsay exception. The court noted that there are several clearly defined categories where the victim's fear of the defendant is directly in issue. The first is a claim of self-defense. *Id.* at 28. Self-defense was not a defense at trial; instead, the defense was that someone else was the shooter.

The second category is where the defendant claims the victim committed suicide. *Id.* That was never an issue here. The third category is when the defendant claims the victim's death was accidental. *Id.* Accidental death was not at issue either. Therefore, the statements did not fall within one of the three *Madson* categories.

In order for statements reflecting the victim's state of mind to be admissible in a criminal trial, the victim's state of mind must be directly placed in issue or must be relevant to some other material issue in the case. *Madson*, 638 P.2d at 29. While identity can in some circumstances be such an issue, *see id.*, here the People argued only that Garcia's state of mind was relevant to the first and third categories

of *Madson*, not that it went to the issue of identity. *See* 1 R. at 27; 4 R. at 29:14-31:15. The statements were therefore not admissible.

As in *Madson*, the admission of these statements were reversible error. The victim's state of mind was not in issue as argued by the People, and accordingly, CRE 803(3) was not satisfied.

4. Hearsay statements to Ilda Garcia

The court allowed two statements Garcia supposedly made to his sister, Ilda Garcia ("Ilda"). The first was a statement from Garcia that he got his drugs from the defendant. *See* 1 R. at 20, App. 26. This is inadmissible for the same reasons as the similar statements made to Juan Garcia—there is no guarantee of trustworthiness to satisfy CRE 807.

In the second statement, Garcia told Ilda that "Defendant was not going to ask for the money that was lost when the drugs were found," and that "Defendant wanted to kill Madera, and that if Garcia-Diaz did not kill Madera, Defendant was going to kill Garcia-Diaz." 1 R. at 20-21, App. 26-27. The court allowed these statements in, finding them to be corroborative of "finding the money, drugs." 4 R. at 40:15-20. But there is no corroboration of the alleged threat by the defendant.

In their motion, the People argued that "evidence of prior threats . . . by a defendant against the victim is competent evidence to show motive, malice or ill will between the victim and the defendant." 1 R. at 25, citing *People v. Gladney*, 570 P.2d 231 (Colo. 1977). *Gladney*, however, is distinguishable. In *Gladney*, the defendant raised the defense that the victim was the initial aggressor. So the victim's state of mind (i.e., her fear of defendant) was clearly relevant to the case. *See* 570 P.2d at 233; *see also Madson, supra* (victim's state of mind is at issue when defendant claims self-defense). Unlike *Gladney*, the statements here did not satisfy the state of mind exception because the victim's state of mind was not in issue. *See* Section IV.B.3, *supra; see also Madson, supra.*

5. Hearsay statement to Mary Garcia

Garcia supposedly told Mary Garcia (Juan Garcia's wife, and thus the victim's sister-in-law) that "he was scared for his family." 1 R. at 21, App. 27. The trial court concluded the statement was corroborated by the victim's behavior, which Mary Garcia observed. 4 R. at 43:13-22. But Garcia did not tell her why he was scared. 1 R. at 21, App. 27. To the extent the testimony was admitted under the residual hearsay rule, it is not sufficiently corroborated by evidence to show

that Garcia was scared for his family *because of Villanueva.*[4] The statement therefore is not admissible under CRE 807. To the extent it was admitted under 803(3), it does not satisfy the state of mind exception as the victim's state of mind was not at issue in the case.

6. Conclusion on admission of hearsay statements

The erroneous admission of the hearsay statements was reversible error. First, for statements erroneously admitted under the residual hearsay exception, the admission of those statements violated Villanueva's constitutional right to confront. Second, regardless of whether the statements were erroneously admitted under Rule 807 or 803(3), the error in admitting them was not harmless. This was not a case of overwhelming evidence. Physical evidence was lacking. Self-incriminating statements were lacking. Blood evidence was lacking. No gun was found. The case rose or fell on the strength of Mario Rivera's testimony. The hearsay statements admitted were highly prejudicial, painting the defendant as the leader of a criminal enterprise. The effect on the jury could have been substantial, and this court cannot say that the outcome would be the same without those

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[4] In fact, at the time, Garcia knew he was wanted by the police for the December 2004 domestic violence incident in which drugs were seized from his house. In late December, Garcia was a fugitive with an outstanding warrant for a few days. His fear at that time certainly could have been fear of being captured by the police.

hearsay statements. Accordingly, the admission of the hearsay statements was reversible error.

C. The court erred in admitting other acts evidence under CRE 404(b).

1. Preservation of issue and standard of review

The People raised the 404(b) evidence in a pretrial pleading, and the court addressed and ruled on the People's request at the motions hearing. *See* 1 R. at 30-43, 4 R. at 3-20. Defense counsel objected to the 404(b) evidence challenged here, and thus preserved the issue. *See* 4 R. at 9:6-11:3, 14:3-16:1.[5]

This court reviews a trial court's decision to admit evidence under 404(b) for abuse of discretion. *See People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993).

2. The trial court erred in allowing the 404(b) evidence.

In *People v. Spoto*, 795 P.2d 1314 (Colo. 1990), the supreme court set forth a four-part analysis to determine whether proffered 404(b) evidence is admissible: (1) whether the proffered evidence relates to a material fact, i.e., a fact of consequence to the determination of the action; (2) whether the evidence is logically relevant, i.e., does it tend to make the existence of a material fact more

[5] Some of the 404(b) evidence is not challenged. Trial counsel did not object to the admission of 404(b) evidence through Mario Rivera, concluding that the evidence could be challenged through cross-examination. 4 R. at 8:13-9:4. Evidence from Danny Trujillo was allowed by the motions judge, *id.* at 19:2-13, but Trujillo ultimately did not testify at trial.

probable or less probable than it would be without the evidence? (3) whether the logical relevance is independent of the intermediate inference, prohibited by Rule 404(b), that the defendant has a bad character; and (4) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at 1318.

The trial court allowed testimony of one incident involving Gloria Madera, Garcia's wife, seeing the defendant with a handgun. *See* 1 R. at 37; 4 R. at 7:2-25. While the reliability and probative value of that evidence is questionable, Villanueva does not challenge the court's ruling on it in this appeal.

The rest of the 404(b) evidence, however, was extensive, highly and unfairly prejudicial evidence about drugs and drug trafficking. It is exactly the type of evidence of bad character that Rule 404(b) is intended to guard against. Allowing it was an abuse of discretion and constitutes reversible error because of the extreme prejudice it caused.

The People sought to introduce extensive evidence of Garcia and Villanueva's "drug dealing." *See* 1 R. at 34-36, App. 28-30. Most of that evidence came though Juan Garcia, the victim's brother. It included 404(b) evidence that Villanueva had allegedly threatened to kill Garcia or his wife. *See* 1 R. at 36, App. 30. It also included evidence of an incident where Villanueva supposedly looked

for a "wire" on Juan, stating that if he found one, he'd have to kill Juan. *Id.* This evidence was highly inflammatory, introduced not to show motive, but to paint the defendant as a bad character. In ruling the 404(b) evidence admissible, the court took no steps to limit it. Instead, the court simply let it all in.

Under the *Spoto* analysis, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and therefore its admission was error. The error cannot be found harmless in this case. The prejudice is palpable, given the nature of the evidence, and the unfairly prejudicial effect on the case is evident because this was not a case of overwhelming evidence. But for the eyewitness Mario Rivera there is little, if any, evidence that links the shooting to Villanueva—no gun, no bullet, no casing, no other physical evidence. Allowing the inflammatory evidence of substantial drug dealing served only to unfairly bias the jury against Villanueva by painting him as a bad character. This is precisely the type of character attack that CRE 404(b) prohibits. It thus was reversible error to allow the 404(b) evidence.

D. The cumulative effect of the trial court's errors mandates reversal.

1. Preservation of error and standard of review

The determination whether trial court errors constitute cumulative error is a legal determination that this court must make by exercising its own independent

judgment, without deference to any decisions of the trial court. *See People v. Botham*, 629 P.2d 589, 603 (Colo. 1981) (granting defendant a new trial because the cumulative effect of the trial errors deprived him of a fair trial). The issue is properly preserved, as it is being raised in this Opening Brief.

2. The cumulative effect of the trial court's errors requires reversal.

Even if this court were to conclude some of the trial errors were not reversible in and of themselves, the cumulative effect of all the errors deprived Villanueva of his due process right to a fair trial and therefore requires reversal. *See Botham*, 629 P.2d at 603. Because of the trial court's improper admission of Garcia's hearsay statements and the inflammatory 404(b) evidence, and its erroneous exclusion of the impeachment of the star prosecution witness, the picture painted at trial was one-sided and unfair. The right to a fair trial entitles a defendant to a fair opportunity to defend against the prosecution case and to not be unfairly attacked on matters not relevant to the crime charged. But here, the prosecution was permitted to smear Villanueva's character, and do so broadly, while Villanueva was not allowed to confront the star prosecution witness. Each of the errors above were reversible, but certainly the cumulative effect of the errors combined to deprive Villanueva of a fair trial. Therefore, reversal is required.

V. Conclusion

Villanueva's conviction should be reversed, and the case remanded for a new trial.

Respectfully submitted this 14th day of August, 2008.

Blain D. Myhre
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2008, a true and correct copy of the above and foregoing **OPENING BRIEF** was served, postage prepaid via U.S. Mail, addressed to the following:

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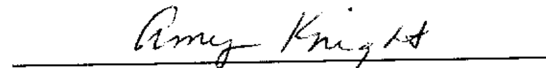

APPENDIX

- Excerpts of trial transcript on confrontation issue — App. 1-23
- Hearsay statements of Garcia (from People's motion) — App. 24-27
- CRE 404(b) evidence (from People's pleading) — App. 28-30
- Text of CRE 807, 803(3), 404(b) — App. 31

1 MR. ELLIOTT: I am hoping that we will take
2 the morning break shortly. I know we're close to being
3 done, and I'm about to examine Mr. Rivera, and
4 depending on the answers he gave about conversations he
5 had with the gentleman named Neo, I may play some
6 snippets of those conversations with him.
7 THE COURT: No problem, we'll break now.
8 MS. MORGAN: Judge, I never heard these
9 conversations. If he's cross-examining my witnesses, I
10 have a right to hear them. At some point, I don't know
11 how long they are, how long the information that you
12 have, but I do have a right to have that.
13 MR. ELLIOTT: If I'm using it for impeachment
14 only and that's what I'm using it for, if he denies the
15 conversation, to see if he can recognize his voice, I
16 do not have to provide them in advance.
17 THE COURT: So you're going to confront him
18 with some prior statements, is that correct? Tell us
19 what you're going to do.
20 MR. ELLIOTT: I'm going to confront him with
21 statements that he made subsequent to this event that
22 he made in conversations with the man that has been
23 testified to as Neo.
24 THE COURT: And are these inconsistent
25 statements or what are they?

1 MR. ELLIOTT: They are inconsistent right now
2 with regard to his knowledge of guns, his ownership of
3 guns, et cetera.
4 THE COURT: That sounds like impeachment
5 information, which I think you need to give to
6 Ms. Morgan.
7 MS. MORGAN: And I also object to any
8 relevance. I thought where he was going with the guns
9 was the issue of sound and how a 9 millimeter sounds.
10 What's the relevance of whether this witness in another
11 time in another place has ever dealt with guns? How is
12 that relevant?
13 MR. ELLIOTT: It is relevant because he denied
14 ownership of guns, he's denied working knowledge of
15 guns, and I think I can show that he has very good
16 working knowledge of guns. He talks about changing
17 barrels, he talks about shooting, things like that, and
18 it is classic, absolute impeachment, and I will cite a
19 case.
20 MS. MORGAN: What I believed the relevance was
21 was the sound of the gun that night. This witness's
22 knowledge of guns, how is that relevant to anything but
23 the noise that night?
24 THE COURT: I think the relevance is on direct
25 he said he saw a big gun, didn't know anything about

1 guns. Apparently he knows more about guns than he is
2 saying he knows about guns. So it goes to credibility,
3 right?
4 MR. ELLIOTT: That is all about credibility,
5 yes, sir.
6 THE COURT: So if you're going to impeach him
7 with statements, they need to be disclosed to the
8 prosecution so they're on the same page. And I'll take
9 a break and give you a chance to get squared away.
10 MR. ELLIOTT: Thank you.
11 MS. MORGAN: I would ask for all of the
12 conversations that you have been provided, not just
13 these snippets, because I don't know the context in
14 which these questions were asked, nor do I know of
15 other conversations where he may have denied. So I'm
16 asking the Court to order him to provide that
17 information to me.
18 MR. ELLIOTT: The snippets are very short.
19 The whole conversations I have in that notebook. I was
20 not going to put in whole conversations. And again, I
21 do not have any intention to put it into evidence, for
22 cross-examination only.
23 THE COURT: Is there context to the snippets
24 that you're going to be asking, some contextual
25 information also contained in it?

1 jail or could have been dead."

2 And then the other witness goes on to say, and

3 I'm paraphrasing, you never got caught. And my

4 witness, "I thank God because I never got caught or

5 else I would be in fucking jail for the rest of my

6 life." Again, I have absolutely utterly no context for

7 it. And again, clearly, if this is a true statement

8 from my witness, talking about a prior bad act -- I can

9 go on for the Court.

10 THE COURT: Let me do this before you do that.

11 What exactly, Mr. Elliott, do you intend to do so I

12 have some idea what you're going to do and what you

13 think it will be for?

14 MR. ELLIOTT: The first clips I would play is

15 a series of clips that talks about his ownership and

16 control over various weapons, one of them being one

17 with a banana clip with a 30-round clip. He talks

18 about wiping it down, wiping fingerprints of both of

19 theirs off of the weapon. We segue into a different

20 track with a different conversation where he talks

21 about changing the barrels of a weapon so as to not be

22 caught, changing barrels of a weapon, because it

23 changes the grooves, and he doesn't use the word

24 projectile, but in a bullet.

25 This goes to what is replete throughout this

1 case, which seems to be that Mario Rivera doesn't have
2 knowledge of weapons, doesn't know what's going on,
3 doesn't have guns. It goes to his credibility. It
4 goes to what weapon, if any, was used.
5 And what I did before the break was laid the
6 foundation to then ask whether or not you had these
7 conversations, did you affirm that you had this weapon,
8 that you lent it to Neo, that you took it back, things
9 like that. If he denied the conversation, it would be
10 my position and intention to play the tape where we
11 have the two of them.
12 I do have a good faith basis that it is him.
13 There are conversations that I was not going to elicit
14 that clearly are referring to Mr. Villanueva and this
15 case. I don't think there's any doubt about that.
16 Then, if I got through that, then it would be
17 questioning as to other items, including a series of
18 statements to the effect that Sergio was there, Sergio
19 being Guerro, Mr. Gonzales, and the snippet you just --
20 well, guns, Sergio there, that's probably about all I
21 was going to use.
22 There is one other episode, if he is going to
23 talk about his, because I'm going to question him about
24 his role in drug trafficking with Benjie, Benjamin
25 Garcia-Diaz, if any. If he denies that, there's an

1 episode that talks about the fact that Benjamin
2 Garcia-Diaz is indeed the source, that he does have a
3 connection in El Paso, not Martin Villanueva. It goes
4 to his working relationship between the parties. It
5 goes to attack his credibility, because he's saying
6 that Mr. Villanueva shot Benjamin, and I'm saying he
7 has no basis to say that and there's no crime scene at
8 38th and Jason.

9 THE COURT: I want to be more specific,
10 because I want to know exactly what he will say and
11 address the 404(b) issue the prosecution raised. From
12 what they just raised, we're talking about other bad
13 acts, and there's a whole analysis, including 403
14 analysis, that the Court needs to apply, and so I want
15 you to address that.

16 MR. ELLIOTT: If we have a good faith basis to
17 ask questions about ownership of the guns, and he
18 denies that, and then there's a conversation that
19 clearly shows, and I would ask him about the
20 conversation, and if he denied that, I think I can put
21 into evidence him talking in a fashion that clearly
22 reflects the ownership of the weapons in plural.

23 THE COURT: Tell me exactly what you're going
24 to impeach him with so I know whether there's a basis
25 under 403, the probative value isn't substantially

1 outweighed by unfair prejudice. And actually, there's
2 the predicate question of whether I can find by a
3 preponderance that these things even happened. There's
4 all those things here which we're trying to resolve as
5 the jury is sitting out in the jury room wondering
6 what's going on. What exactly is it you seek to have
7 played to the jury?
8 MR. ELLIOTT: I was going to seek to have
9 played to the jury -- is it quicker if I let the Court
10 read it or read it into the record.
11 THE COURT: We need a record on in.
12 MR. ELLIOTT: Neo: "Like I'm paranoid, Mario,
13 because after fucking -- after Benjie got killed, after
14 Benjie got killed, dude, you know, um, within that same
15 week, or, or a month, no more than a month, but you
16 fucking, you brought me back my car, you know, you gave
17 me the 9 millimeter with a 30-round clip, you know.
18 Mario: "I didn't give it to you.
19 Neo: "You didn't give it to me, you lent it
20 to me, you know, and I --
21 Mario: "That gun, that gun is still around
22 because I, I just checked on it, and they still got the
23 gun.
24 Neo: "I know, but you told me that the
25 fucking thing was dirty, dude, and then the cops said

1 it's still --

2 Mario: "Yeah, but they don't got the gun, so

3 why the fuck are you paranoid about the gun?

4 Neo: "Because, dude, why?

5 Mario: "You don't have that gun, dude. I

6 talked to my friend. He has the gun.

7 Neo: "Okay, but what I'm saying is, is, is

8 that fucking, is that, you know, you did not give me

9 the gun, you let me borrow it. I tried to buy it from

10 you, but you're pussy about your guns, you know, you've

11 always been that way, because you were like you fucking

12 you needed it for fucking protection, you know, and

13 that's when you fucking came back to get it from me.

14 But still, you know, I just want to fucking make sure,

15 dude, because my prints --

16 Mario: "They don't have the gun. I checked

17 it."

18 And it goes on. This is the only long snippet

19 of the whole thing. It talks about, if I can

20 paraphrase, wiping fingerprints off the gun and

21 cleaning the gun and being after Benjie's death.

22 THE COURT: Is this talking about the gun used

23 in this particular case?

24 MR. ELLIOTT: I don't know. No gun was ever

25 recovered in this case.

1 THE COURT: Now, tell me, what is that
2 impeaching? What testimony is that impeaching?
3 MR. ELLIOTT: It is impeaching his testimony
4 that, number one, he doesn't know much about guns, he
5 knows the difference between a 9 millimeter and a 22,
6 that the gun was big, but that it was not loud, that it
7 came in a CD case, that it was gray, a reference made
8 last night that -- two nights ago to Mr. Watts that it
9 was something bigger than a 22.
10 THE COURT: I guess the initial question I
11 have is how does what you just read impeach that
12 testimony? Because he testified he doesn't know much
13 about guns, but he shot guns, his friends' guns, so
14 what statement is that impeaching?
15 MR. ELLIOTT: It's impeaching because he is
16 saying he doesn't have the guns, he doesn't own guns.
17 It's clear this is impeaching that statement, but he's
18 clear about a gun he had dominion and control over and
19 has with somebody else now. He actually lent it to
20 Neo, Neo returned it, it was somewhere else. He also
21 testified that he had never worked on guns, had no
22 working knowledge of guns, never taken one apart, and
23 I'm segueing off to the whole separate conversation
24 about the barrels.
25 So that's there, he has said it, and I don't

1 know that Ms. Morgan has had a chance to get back
2 anywhere to the barrels and grooves, and that's at the
3 end of these conversations.
4 THE COURT: We kind of need to know what
5 you're doing here, because cross-examination is right
6 now, so what else are you going to seek to impeach with
7 so I can know all the things?
8 MR. ELLIOTT: May I run out and get my list?
9 THE COURT: Yeah.
10 MR. ELLIOTT: The first track I was going to
11 play was track 4, it is a conversation September 22,
12 the first conversation, the very first, and it's
13 starting on page 5 and it goes through page 8. That is
14 what I initially read to you. That's what I was
15 reading.
16 MS. MORGAN: These are conversations, my
17 understanding, from September of 2006.
18 MR. ELLIOTT: Correct.
19 MS. MORGAN: So a year and a half after this
20 happened.
21 MR. ELLIOTT: The second track was from page
22 5, first conversation, where I will paraphrase what it
23 says. Neo is asking for the gun with the banana clip.
24 Mario is saying something about death mobile that made
25 no sense. Neo says, that's why I borrowed the gun from

1 you, and then you're like, I need it, I need it.

2 Mario says, and I quote here, "Fucking A, I

3 need it, dude, the motherfucker pulls up next to us, to

4 me, at the light, fucking starts shooting. I'm a shoot

5 back, especial his ass." That's track 2. That was the

6 second track I was going to play.

7 The third track I was going to play was track

8 19. Mario: "Like on my gun, if they find a gun on

9 you, fool, all you got to -- like if you shoot somebody

10 and you shoot the gun, they -- they want the gun. You

11 don't have to get rid of the gun. All you got to do --

12 all you got to get rid of is the barrel, because that's

13 what makes the mark on the bullet, the barrel.

14 Neo: "How often do you got to change the

15 barrels?

16 Mario: "Depends on how far you're looking for

17 that gun."

18 The next one I was going to play is track 20,

19 also from October 20, and he goes on and talks about,

20 and I'm paraphrasing here, Judge, I can certainly read

21 it into the record. "Each barrel, dude, is different,

22 each barrel is different, makes a different mark on a

23 bullet." And then he talks about not liking revolvers

24 and the difference between the two, and you can't take

25 the barrel off of a revolver, which goes to his working

1 knowledge of weapons. Those are the four tracks that
2 deal with weapons.
3 THE COURT: Okay. Ms. Morgan.
4 MS. MORGAN: Thank you, Judge. The first
5 thing I think the Court has to look at, whether or not
6 any further inquiry is actually relevant for the
7 impeachment purposes that counsel is seeking to impeach
8 the witness. What this witness has repeatedly
9 testified to, he doesn't know exactly what type of gun
10 it was that Martin was firing. Benjie told him it was
11 a 9 millimeter, but he doesn't know exactly himself,
12 but he then said he knew it wasn't a 22.
13 Now, what counsel is trying to do, he never
14 said, I don't know about guns. All he said was, I
15 don't know what kind of gun he was shooting. So then
16 we go into a mix of what happens to be, sort of
17 alternate suspect, again, we've had no notice of that,
18 prior bad acts of this witness where he talks about
19 disposing of barrels and can't get it from a revolver
20 and shooting at someone that pulls up to a light, I
21 think that that's what he talks about, at a time
22 unknown, possibly before, possibly before this
23 homicide, with the attempt then to show that he knows
24 about guns.
25 Again, my objection is, first, relevance.

1 It's not that he doesn't say he knows about guns, he
2 just says he doesn't know what kind of gun it was that
3 he shot. Then the issue is, is this information in the
4 context in which he's played so overwhelmingly
5 prejudicial that I can never recover from it, balanced
6 with the relevance which is, at best, minimal?
7 I don't think I can hope to have my witness
8 explain without having him go into a great deal of
9 detail about four things. One, he has a Fifth
10 Amendment right; and, two, never been charged, and
11 again, I don't know that it's him, to try and
12 rehabilitate him. And I just add to it, I have no
13 notice of this. I have no chance to investigate it.
14 No motions filed to put me on notice of this, so
15 really, I could more adequately address for the Court,
16 but I feel I'm in somewhat of a powerless position,
17 that I'm about to be sideswiped with information that I
18 should have had before.
19 THE COURT: Anything further, Mr. Elliott?
20 MR. ELLIOTT: Judge, it is, in my opinion, for
21 impeachment purposes only for the person whose
22 credibility is the pivotal point in the case and his
23 statements about the guns and his statements already in
24 the record, I think I'm entitled to impeach on that,
25 because it goes to his credibility.

1 THE COURT: I certainly agree that, and the
2 case law is very clear, there's wide latitude with
3 respect to impeaching or challenging the credibility of
4 witnesses. So that's the background, I acknowledge
5 that, and I acknowledge that the case law is strong
6 that there should be wide latitude with respect to
7 impeaching the credibility or challenging the
8 credibility of a witness's testimony. And I appreciate
9 the fact that this particular witness is the crucial
10 witness here.
11 My concerns are these: First of all, having
12 heard the statements and heard the context or nature of
13 the statements, first of all, I don't find them to be
14 particularly impeaching in the sense -- in the context
15 of what this witness testified. He testified that he
16 has -- he testified he didn't know today whether this
17 gun that was used was a 9 millimeter or something else.
18 He said it was a big gun.
19 And apparently in the past he testified it was
20 a 9 millimeter or surmised at some point it was a 9
21 millimeter. But today, he didn't know if it was a 9
22 millimeter or something else, but it was a big gun. He
23 testified that he knew it was not a revolver, the
24 revolver has the little round thing that is the
25 cylinder. But he seemed to know the difference between

1 a revolver and a 9 millimeter semiautomatic. So he
2 didn't deny all knowledge of gun, he had that
3 knowledge.
4 And that's the context we're in right now. So
5 he's also testified that he didn't own a gun himself,
6 but he has fired guns owned by his friends. So that's
7 the context of the testimony. And quite frankly, I
8 first of all, don't necessarily find that the
9 statements being offered here are impeaching to that
10 information.
11 And layered on top of that is the fact that
12 the information that you intend to play are
13 extraordinarily prejudicial. They're highly
14 prejudicial in the sense that they deal with other
15 transactions that may or may not have occurred
16 involving other acts which may not have occurred.
17 They have a substantial tendency, I think, to
18 mislead the jury, to lead them down the wrong path, to
19 distract them from the issues in this case, and is
20 marginal, at best, that this value has to impeaching
21 the limited testimony we're talking about, is
22 substantially outweighed by the unfair prejudice and
23 confusion of the issues.
24 So under those bases, I'm finding it's not
25 proper testimony and I will not allow it. What else?

1 Anything else?

2 MR. ELLIOTT: So the record is clear as to how

3 I'm to deal with cross-examination, I can't play the

4 tapes, am I allowed to question him on conversations he

5 had with Neo and say, you testified you didn't have a

6 gun, didn't you lend a gun of yours to Neo? Or is the

7 Court saying this is all encompassed in its ruling

8 right now?

9 THE COURT: It's all encompassed in my ruling

10 right now.

11 MR. ELLIOTT: And does that apply as well

12 to -- this has nothing to do with guns, Benjamin being

13 the hook-up, the source, things like that?

14 THE COURT: I haven't heard anything about

15 that yet. Is this dealing with drugs?

16 MR. ELLIOTT: Yes.

17 THE COURT: We haven't gotten to that portion

18 of your examination of the witness then?

19 MR. ELLIOTT: Yes. There was two more things

20 I was going to confront him with.

21 THE COURT: So I don't know how this is going

22 to play out, I don't want to have you tip your hand

23 where you're going. In light of that, what do you want

24 to tell about where you want to go?

25 MR. ELLIOTT: This goes to his involvement

1 with Benjamin and drug trafficking, track 17, there's a
2 tiny little one back here, it's on the October 20
3 conversation, he talks about Benjamin being the hook-
4 up. Track 16, Benjamin is the hook-up, he would get
5 the dope in El Paso, or he would get the dope.
6 MS. MORGAN: I'm sorry, I just need to be able
7 to review, because it may be clear to me that this is
8 relevant and we can save some time.
9 THE COURT: Mr. Elliott, you have more
10 cross-examination you need to do, is this the next
11 area? My question is simply in terms of scheduling,
12 are there other areas that you can go into, take a
13 lunch break, they can look at this, and then you can
14 come back after lunch? Or is this where you're going
15 next?
16 MR. ELLIOTT: I don't have that much more, but
17 I can pose something to the Court, and I don't know
18 that anybody wants to do this, but that would be, take
19 a break from this witness, if there's somebody else
20 ready to go, and deal with that.
21 THE COURT: The third option is we, heaven
22 forbid, break for lunch early. It's 11:30, we haven't
23 done a lot today, but it's not totally unreasonable to
24 break for lunch and come back at 12:30 as opposed to
25 12:00 and give you an hour to think about this. And

1 AFTERNOON SESSION
2 (The following proceedings were had in
3 chambers out of the presence of the jury:)
4 THE COURT: We're back in chambers on
5 06CR10408. Parties and counsel are present, the jury
6 is not. And we've had over the lunch hour to look at
7 where we're going from here and where we stand.
8 MS. MORGAN: Judge, I can let the Court know
9 that Mr. Elliott identified for me five other tracks
10 that, depending on the answers of Mr. Rivera, he may or
11 may not seek to impeach him with. I reviewed those.
12 Whereas I may have a relevance objection to the initial
13 questions, they are not of the nature of guns and
14 alleged prior bad acts. So therefore, I'm happy to let
15 it play out in the courtroom, and I think if I have a
16 relevance objection that's not impeachment, we can
17 certainly do that at the bench. They're very short.
18 MR. ELLIOTT: I'll tell the Court what they
19 are, just so you have a heads-up. One had to do with
20 Benjamin being the hook-up, Benjamin being the contact
21 to get drugs to Mr. Villanueva. The other two had to
22 do with Sergio being there, Sergio knew something.
23 THE COURT: Being there?
24 MR. ELLIOTT: It's not clear in the language
25 of that. It says "there." The question is, who is all

1 there? And our position is Mr. Villanueva is not
2 there.
3 THE COURT: There the night of the alleged
4 homicide?
5 MR. ELLIOTT: Wherever it is, and at the very
6 least, 7-11, and Sergio knew what happened. The final
7 thing has to do with impeachment of Mario as it relates
8 to his actions and his response upon receiving a phone
9 call from Benjamin's family. Those are the three, so I
10 think they can play out in the courtroom.
11 Judge, I need to make a record and try to
12 focus on your prior ruling in the context of
13 questioning on the gun. I understand the Court's
14 ruling, I understand how you've articulated it, and I
15 guess what I'm saying to you is, I still think that I
16 should be able to elicit from this witness, did you
17 have conversations with Neo, did you talk about the gun
18 you had let Neo borrow, that Neo gave back to you.
19 I'd segue into the barrels of the gun, how do
20 you know about barrels of the gun and groove marks of
21 bullets, without going into shooting anybody, without
22 going into police interaction, but he already denied
23 taking apart of the gun. And credibility of this
24 witness is the foundation of this case, we all know
25 that.

1 If the jury accepts his version, it's one
2 direction. If they are not convinced beyond a
3 reasonable doubt as to his version, it would be a
4 different result. Everything else is a dance around
5 the credibility of Mr. Rivera, and I think I can do
6 that in a fashion that does not open the door to the
7 concerns that you have articulated in your ruling in
8 terms of prejudice to the People.
9 THE COURT: I'm still struggling somewhat with
10 the issue. Is this supposedly talking about the gun
11 that was used in the homicide?
12 MR. ELLIOTT: I could not tell you one way or
13 the other. I don't know. The reference does not say
14 this is the gun. There is no reference. I think
15 Ms. Morgan should now have an opportunity to at least
16 read that portion of the transcript, and there is not a
17 context that says to me they're talking about the gun
18 from this homicide, but there's not the flip of that
19 either.
20 THE COURT: Can you articulate for me what it
21 is you think this is impeaching of?
22 MR. ELLIOTT: It is impeaching of the fact
23 that he just testified in cross-examination that he did
24 not own a gun, that he had never worked on a gun, never
25 taken a gun apart. And I don't know if I asked him if

1 he ever cleaned a gun for fingerprints or if he ever
2 cleaned a gun. And when someone says no, as he did, I
3 think I should be able to elicit the fact that how do
4 you know about taking the barrel off the gun?
5 THE COURT: How are you going to approach
6 that? I'm just asking.
7 MR. ELLIOTT: Mr. Rivera, you recall certain
8 conversations with Mr. Arias over the phone over the
9 course of the summer and fall of last year? He may
10 deny that, or he may admit it. Regardless, I would
11 say, isn't it true, Mr. Rivera, you told Mr. Arias
12 about the knowledge of the effect of a barrel on
13 particular markings on a bullet? Is it not true you
14 talked to him about how to take a gun apart and change
15 the barrel? That's where I would go.
16 THE COURT: And if he says no?
17 MR. ELLIOTT: If he says no, I think I am
18 stuck with two options. One is no response, the other
19 is to call Mr. Arias.
20 THE COURT: Ms. Morgan.
21 MS. MORGAN: Judge, I will go back to my
22 original as it relates to the relevance of this line of
23 questioning. The reason that I did not object to the
24 fact that whether or not he had owned a gun or borrowed
25 a gun or shot a gun as to relevance was because I

1 believe Mr. Elliott was headed in the direction, which
2 I think is relevant, as to the noise of a gun. Mr.
3 Elliott made that part of his defense, and I understand
4 that.
5 Whether or not -- because he has not
6 identified Mario as an alternate suspect, whether or
7 not Mario owns a gun at any point, has given it to
8 anybody, in my mind, is not relevant. Add to that, he
9 has already testified, the only thing that he says is
10 he doesn't know what kind of gun it is. That's the
11 extent of it. He can't identify it.
12 I will also tell the Court that in my brief
13 review of these transcripts, it appears entirely
14 consistent, Mario talking to Neo, that Martin killed
15 Benjie. There's nothing in those conversations that
16 would indicate that Mario was the shooter that night.
17 In fact, there are conversations that I'm sure that had
18 I had an opportunity to have these beforehand, I would
19 have liked to have elicited as prior consistent
20 statements.
21 So when the Court asked, is he talking about
22 the gun, I don't see how he can be talking about the
23 gun when he is clearly implicating Martin in these
24 conversations with Neo as he always has consistently
25 done to my knowledge. So therefore, any adjacent

1 relevance, potential relevancy about could he be the
2 one who is taking apart this gun becomes moot when we
3 know that.
4 THE COURT: I appreciate the further
5 explanation as to the questions you want to ask. It
6 doesn't change my analysis. I think the analysis is
7 the same. It's impeaching of a matter in a marginal
8 way, in my view. I think the 403 issues are
9 dispositive, and the marginal relevance is outweighed
10 by the substantial prejudice. And I think all this
11 evidence tends to impeach the character of the witness
12 as opposed to the testimony. Thank you.
13 MS. AMICO: May I make a record on another
14 issue, briefly, Your Honor? As we were coming back
15 into the courtroom for 12:30, I came out of the
16 restroom while the sheriffs were bringing Mr.
17 Villanueva down to the courtroom. I looked down the
18 hall to see if any of the jurors were present. They
19 were not. I followed him down, made the corner to the
20 courtroom, there was one juror, Mr. Muniz, who was
21 turned on his back talking on his cellphone, who did
22 not look at the Defendant, or any other jurors. And I
23 want that on the record with respect to the transport
24 of Mr. Villanueva back to the courtroom.
25 THE COURT: Thank you.

FILED IN DENVER
DISTRICT COURT
DENVER, COLORADO
06 APR 17 AM 11: 20

District Court, City and County of Denver, Colorado City and County Building, Room 111 1437 Bannock Street Denver, CO 80202	
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO **Defendant: MARTIN VILLANUEVA**	σ COURT USE ONLY σ
Michelle A. Amico, Reg. No. 23079 Helen Morgan, Reg. No. 22783 Chief Deputy District Attorneys For: Mitchell R. Morrissey, Reg. No. 13784 District Attorney 201 West Colfax Ave., Dept. 801 Denver, CO 80202 Phone Number: 720-913-9000 Fax Number: 720-913-9035	Case Number: **06CR10408** Div.: Criminal Ctrm: 11

PEOPLE'S MOTION TO ADMIT HEARSAY STATEMENTS OF DECEASED VICTIM, BENJAMIN GARCIA-DIAZ (05)

MITCHELL R. MORRISSEY, District Attorney in and for the Second Judicial District, State of Colorado, by and through his Chief Deputy District Attorney, moves this Honorable Court to admit certain hearsay statements of the deceased victim, Benjamin Garcia-Diaz. As grounds therefore, the People state the following:

A detailed factual background has been provided in the People's Notice of Intent to Introduce Other Acts or Transactions Pursuant to C.R.E. 404(b) or as Res Gestae Evidence (04).

STATEMENTS OF GARCIA-DIAZ SOUGHT TO BE INTRODUCED AT TRIAL

The following statements made by the deceased victim, Benjamin Garcia-Diaz, to various witnesses are those sought to be admitted at the time of trial:

Witness Mario Rivera

Statements related to drug-dealing activity and Defendant's motive:

- On January 25, 2006 Rivera testified at preliminary hearing under oath that after Garcia-Diaz was arrested in December 2004, Garcia-Diaz told Rivera that **the cocaine found at the house was Defendant's**. Rivera further testified that Garcia-Diaz told him **he (Garcia-Diaz) owed about $30,000 to Defendant**.

Statements related to the victim's then existing state of mind regarding Defendant and Defendant's motive:

- On March 29, 2005, Rivera reported to Detective Wilson that Garcia-Diaz told him to **be careful of Defendant.** According to Rivera, Garcia-Diaz told him that **Defendant has family in El Paso and all Martin's family does is sell drugs.**

- On March 29, 2005, Rivera reported to Detective Wilson that Garcia-Diaz told him that Rivera **should watch out for Martin as Defendant always carries a 9mm gun on him.**

Witness Juan Garcia

Statements related to drug-dealing activity and Defendant's motive:

- On January 26, 2006 Garcia (the victim's brother) detailed for Detective Vigil his conversations with Garcia-Diaz about his involvement with Defendant in the business of selling cocaine. Garcia gave further details about this drug dealing in an interview with Detective Vigil on April 12, 2006. According to Garcia, Garcia-Diaz told him the following about the cocaine business:

    - **He had been selling cocaine for Defendant for two or three years.**
    - **Defendant supplied the cocaine.**
    - **He was selling two to three kilos of cocaine a week with Defendant**
    - **The most he sold was four kilos at one time.**
    - **He bought the drugs for $18,000 to $19,000 a kilo and sold them for $24,000 to $25,000 a kilo.**
    - **He said the cocaine was 96 percent pure.**
    - **He and Defendant would cook crack at Garcia-Diaz's mother's house when she was in Fort Morgan.**
    - **He would go to the Mexican border to Juarez on the bus from Denver with sacks of Defendant's drug money. Defendant would pay for 2 seats, one for Garcia-Diaz and one for the money sack. The sack was so big Garcia-Diaz could sleep up next to it. He would go almost once a week until December 2004. He would drop the money at his destination then come back.**
    - He stated that **when he left the house on December 19, 2004 he took $30,000 with him that belonged to Defendant.** This is corroborated by Madera who told Detective Vigil on February 28, 2006 that when

Garcia-Diaz left the house on December 19, 2004 he took a package from the closet.

- **He gave Defendant the $30,000, but that as the police found the 2 kilos which were Defendant's, he still owed Defendant $30,000.**

Garcia stated that Garcia-Diaz was angry at Madera for turning him in. According to Garcia, Garcia-Diaz stated: **"Fucking Gloria turned me in and mentioned Martin in there too."** Garcia-Diaz also asked Garcia if he found any drugs when he went to the house with Defendant. Garcia stated that he had not. Garcia-Diaz replied: **"So you didn't find anything? So that fucking bitch turned me in?"**

Garcia admitted that he bought cocaine from Garcia-Diaz. Garcia-Diaz stated that he sold a lot of cocaine in 2003, but that his wife caught him and that he sold a lot less in 2004.

Statements related to the victim's then existing state of mind regarding Defendant and Defendant's motive:

- On April 6, 2005 Juan Garcia told Detectives that Garcia-Diaz had called him once and told him that if **he was ever killed Martin would be the person that killed him.** On January 26, 2006 Garcia affirmed this statement and explained to Detective Vigil that Garcia-Diaz told him this periodically, six or seven times. Garcia explained that the first time Garcia-Diaz told him this was in December 2004. Garcia and his wife had been out of town. Garcia stated that Garcia-Diaz said **"Hey Juan, some day if I disappear you guys are never going to find me but you know who it is, it's Martin Villanueva."** According to Garcia, Garcia-Diaz did not say at the time why Villanueva was going to kill him.

<u>**Witness Ilda Garcia**</u>

Statements related to drug dealing activity and Defendant's motive:

- Ilda Garcia is Defendant's sister. Prior to Christmas Day, 2004 Garcia-Diaz had told his sister that **he got drugs from the Defendant.**

Statements related to the victim's then existing state of mind regarding the Defendant and Defendant's motive:

- According to Ilda, on Christmas Day 2004, when Garcia-Diaz was wanted for the domestic violence incident involving Gloria Madera, but before he turned himself in, Garcia-Diaz told her that **Defendant was not going to ask for the**

money that was lost when the drugs were found. Garcia-Diaz told his sister that **Defendant wanted him to kill Madera, and that if Garcia-Diaz did not kill Madera, Defendant was going to kill Garcia-Diaz.**

The debt by Garcia-Diaz to Defendant was corroborated by Rivera's preliminary hearing testimony referenced above as well as by Juan Garcia.

Witness Mary Garcia

Statements related to the victim's then existing state of mind regarding the Defendant and the Defendant's motive:

Mary Garcia is the wife of Juan Garcia and the sister-in-law of Garcia-Diaz. In an interview dated April 11, 2006 Ms. Garcia relayed an incident to Investigator Jeff Watts of the Denver District Attorney's Office. Ms. Garcia recalled an occasion when she was home and Garcia-Diaz was upstairs laying on the bed in their (Juan and Mary's) home. Ms. Garcia believes this was after the incident between Garcia-Diaz and Madera, but before he turned himself in. Garcia-Diaz was on the telephone with Defendant. Ms. Garcia knew Garcia-Diaz was talking to Defendant because she heard him call the person on the phone by the name "Martin". Ms. Garcia stated she knew how Garcia-Diaz talked to Defendant from being around him and that is another reason she knows he was talking to Defendant. Ms. Garcia was doing chores around the bedroom and primarily wasn't listening to the content of the conversation. Ms. Garcia remembers Garcia-Diaz saying to Defendant something like "No, no, no fool. It ain't like that." Garcia-Diaz was crying when he got off of the telephone. Garcia-Diaz was pacing the floor, sitting up and down and watching out the window as if he thought someone was coming to get him. Garcia-Diaz told Ms. Garcia that **he was scared for his family**, but he did not tell her why he was scared. Garcia-Diaz seemed nervous and tense to Ms. Garcia.

CRAWFORD ANALSYIS – NON-TESTIMONIAL STATEMENTS

Until recently, the constitutional admissibility of hearsay statements was determined according to the two-prong test of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Under this test, a court could admit statements made by a declarant who did not testify if the prosecution showed that (1) the declarant was unavailable and (2) the statements were reliable, either because they fell within a "firmly rooted" hearsay exception or because they bore "particularized guarantees of trusthworthiness." *Roberts, supra* at 2539. Later, the court refined the *Roberts* test, dispensing with the need to show unavailability when the declarant's statements fell within a firmly rooted hearsay exception. *See White v. Illinois,* 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

In *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1324, 158 L.Ed.2d 177 (2004), the Supreme Court abrogated *Roberts* and adopted a new test for determining whether admission of hearsay testimony at trial will violate a defendant's constitutional right of confrontation. The

23. It will be the People's contention at the time of trial, based upon evidence in the case, that Defendant and Garcia-Diaz were in the business of dealing drugs, specifically that Garcia-Diaz sold drugs for Defendant. The People will assert that the drugs which were taken by police officers from Garcia-Diaz's home on December 19, 2004 belonged to Defendant. Once these drugs were taken, Garcia-Diaz was then in debt to Defendant for the replacement value of these drugs, which was approximately $30,000. In addition, once charges were filed against Garcia-Diaz, Defendant's drug empire was at significant risk of being exposed. Garcia-Diaz's death would prevent exposure of Defendant's drug empire. Thus, the People will contend Defendant had overwhelming motive to murder Garcia-Diaz. The People seek to introduce Defendant's prior drug use and threats toward Garcia-Diaz to show motive, opportunity, intent, preparation, knowledge and identity as the perpetrator of the crime charged.

DEFENDANT'S PRIOR DRUG ACTIVITY

In order for Defendant to effectively respond to the People's Notice, the People provide the following notice of the evidence of Defendant's prior drug activity they seek to introduce:

Witness Mario Rivera

Rivera was friends with Garcia-Diaz and was aware that Garcia-Diaz used to sell drugs for Defendant. Further, Rivera was aware that Garcia-Diaz kept the drugs at his house.

Witness Juan Garcia

On January 26, 2006 Juan Garcia (Garcia) gave a detailed interview with Detective Vigil about his involvement with Garcia-Diaz and Defendant in the business of selling cocaine. Garcia is one of Garcia-Diaz's brothers. Garcia gave further details about this drug dealing in an interview with Detective Vigil on April 12, 2006. Garcia related the following about the business:

- Garcia knows that Garcia-Diaz was selling drugs for Defendant.
- Garcia observed Garcia-Diaz and Defendant with one to four kilos of cocaine in the kitchen of Garcia-Diaz's home about three times in 2004.
- Garcia described how the cocaine would be laid out in the kitchen during the day when Madera was not at the home.
- Garcia described how the cocaine was packaged and where there were scales. He described seeing how the cocaine was cut and packaged into smaller packages.
- Garcia saw Defendant pick up a large sum of money from Garcia-Diaz in 2003 or 2004.

Garcia admitted that he bought cocaine himself from Garcia-Diaz. Garcia stated that he sold a lot of cocaine in 2003, but that his wife caught him and that he sold a lot less in 2004. Garcia stated that in 2003 he got cocaine from Garcia-Diaz about 60 times.

Garcia admitted that he knew the cocaine was cocaine because it looked, felt, smelled and tasted like cocaine.

Garcia stated that they would use the following terms to describe the cocaine: Bucket of paint, pizza, an old lady, a prostitute and strippers.

Garcia described an incident immediately after December 19, 2004 (the day the police responded to the victim's home as a result of the menacing incident with Madera) when he went to look for the cocaine in Garcia-Diaz's house with Defendant, not knowing that the police had already found it. According to Garcia, the day after December 19, 2004 Garcia-Diaz kept calling and asking him to go over to his house. Garcia-Diaz told Garcia that "Martin will meet you over there". Garcia said he met with Defendant at Garcia-Diaz's house and that Defendant had a key to the house. Garcia and Defendant went into the house. Defendant directed Garcia to look in the vent in the kitchen and then behind the television in the master bedroom. They were looking for Defendant's drugs that Defendant stored at Garcia-Diaz's house. Garcia-Diaz found nothing in these places. Defendant remarked to Garcia that "they found it." Garcia understood this to mean that the police had the cocaine. Prior to this date, Garcia had no idea where Garcia-Diaz had secreted the cocaine in the house.

Garcia's assertion that Defendant had a key to the house is confirmed by Madera. She told Detective Vigil that one day prior to December 19, 2004 she made Garcia-Diaz go with her and the children somewhere. Garcia-Diaz complained and said he had business to do. According to Madera, Garcia-Diaz went with Madera by 38th near the Chubby's (this is the area of Defendants' home). Garcia-Diaz gave the key to the house to Defendant. Garcia-Diaz told Defendant that he had things to do at the house that "Gloria wouldn't let him do". Madera thought it was about girls.

Garcia also told Detective Vigil about threats from Defendant directed towards Garcia-Diaz. According to Garcia, after December 19, 2004 but before Garcia-Diaz turned himself in, Garcia heard Garcia-Diaz on the phone with Defendant. The phone was on speaker and Garcia recognized Defendant's voice. Garcia-Diaz said: "If something happens I'm going to turn you in." Defendant replied: "You do, I'm going to kill you. I'm gonna put a gunshot in your head."

Immediately after Garcia-Diaz's murder, on April 6, 2005 Garcia reported to Detectives that Defendant owned a property at 3330 Lafayette Street. Garcia stated that in December 2004 he went with Garcia-Diaz to that property. According to Garcia, they met Defendant at the property as he was redecorating the building. Defendant then searched Garcia-Diaz and stated he was "looking for a wire." Defendant told Garcia and Garcia-Diaz that if he had found a wire he would have killed Garcia-Diaz and Garcia.

Garcia gave a more detailed description of this incident on January 26, 2006 and April 12, 2006 to Detective Vigil. Garcia stated that after Madera and Garcia-Diaz had argued on December 19, 2004 and before Garcia-Diaz had turned himself in, which occurred on December 27, 2004, he and Garcia-Diaz went to a house that Defendant and Nacho were renovating on 33rd and Lafayette. The purpose of the trip was that someone had called Garcia-Diaz and wanted kilos of cocaine. Defendant was supposed to bring them. Garcia and Garcia-Diaz waited for about half and hour for Defendant to show up. When Defendant did show Garcia-Diaz said: "Did you bring that stuff fool?" Defendant said: "What stuff fool – I don't know what you are talking about." Defendant got off the counter top where he was sitting and said: "Are you wired?" Defendant started looking under Garcia Diaz's shirt and pants. Defendant said: "If you're wired man, I'm gonna kill you." Defendant said to Garcia: "I'm sorry Juan, you know, you're going to dance with him too."

According to Garcia, during the same incident the following conversation occurred between Garcia-Diaz and Defendant regarding Madera:

Defendant: "Benji, we're going to have to get rid of her, kill her."
Garcia-Diaz: "No, don't fuck with her."
Defendant: "It's a green or red light. It's your call Benji. She either goes or you."
Garcia-Diaz: "Fuck you. Don't fuck with my family."
Defendant: "Let's go right now. Do a drive-by."
Garcia-Diaz: "No, I've got my kids in there."

Witness Gloria Madera

On March 31, 2005 Madera told Detective Crider that she thought Garcia-Diaz was dealing drugs for Defendant. In 2006 she told Detective Vigil that Garcia-Diaz would get calls about picking up "ladies" and that Garcia-Diaz and Defendant would talk about "ladies". Given Garcia's information it is apparent he was talking about cocaine. Madera also stated that Garcia-Diaz would hide things, including money, in the house.

Witness Danny Trujillo

Danny Trujillo (Trujillo), an associate of Defendant's, confirmed that Defendant dealt cocaine. Trujillo told Detective Vigil on October 7, 2005 that he bought cocaine from Defendant. Trujillo stated that the most he bought from Defendant was four ounces and the least was one ounce. Trujillo also stated that he knew Garcia-Diaz through Defendant, and that Defendant would go to Garcia-Diaz's house. Trujillo also stated that after December 19, 2004 Defendant told Trujillo that Garcia-Diaz "got caught with some stuff" and that Defendant needed to bail him out.

CRE 807: A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

CRE 803(3): The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . .

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

CRE 404(b): **(b) Other Crimes, Wrongs, or Acts.** 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.