

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

CERTIFICATE OF WORD COUNT: 4,611

DEC 19 P 3:10
JUSTICE RYAN
COURT OF APPEALS

**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:

Case No.: 07 CA 858

**THE PEOPLE OF THE STATE OF
COLORADO**

Defendant-Appellant:

MARTIN VILLANUEVA

Counsel for Defendant-Appellant:
Blain D. Myhre, #23329
Isacson Rosenbaum P.C.
633 Seventeenth Street, Suite 2200
Denver, Colorado 80202
Phone No.: 303-292-5656
Fax No.: 303-292-3152
E-mail: bmyhre@ir-law.com

REPLY BRIEF

TABLE OF CONTENTS

I.	Summary of the argument	1
II.	Argument	2
A.	The trial court denied Villanueva his right to confront the only eyewitness in the case	2
1.	Shutting down cross-examination of Rivera was a confrontation violation.....	2
2.	The confrontation violation was not harmless beyond a reasonable doubt.....	6
B.	The trial court erred in allowing Garcia's hearsay statements.....	7
1.	The issue is properly before the court	7
2.	It was reversible error to allow Garcia's hearsay statements.....	8
a.	Hearsay statements to Mario Rivera.....	10
b.	Hearsay statements to Juan Garcia	11
c.	Hearsay Statements to Ilda Garcia.....	16
d.	Hearsay statement to Mary Garcia.....	17
e.	Conclusion on hearsay statements	18
i.	Villanueva states both a confrontation claim and an evidentiary one.....	18
ii.	It was reversible error to allow the hearsay statements.....	19
C.	The trial court erred in admitting CRE 404(b) evidence	20
D.	Cumulative error requires reversal.....	21
III.	Conclusion	21

TABLE OF AUTHORITIES

Cases

<i>Bernal v. People</i> , 44 P.3d 184 (Colo. 2002).....	9, 10, 13, 14, 15, 17
<i>California v. Green</i> , 399 U.S. 149 (1970).....	2
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	2
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).....	18
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986).....	6, 7
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990).....	9, 10, 15
<i>People v. Botham</i> , 629 P.2d 589 (Colo. 1981).....	21
<i>People v. Cobb</i> , 962 P.2d 944 (Colo. 1998).....	6
<i>People v. Dement</i> , 661 P.2d 675 (Colo. 1983).....	18
<i>People v. Fry</i> , 92 P.3d 970 (Colo. 2004).....	2, 3, 5, 18
<i>People v. Fuller</i> , 788 P.2d 741 (Colo. 1990).....	8, 9, 12, 16, 19
<i>People v. Golden</i> , 140 P.3d 1 (Colo. App. 2005).....	6
<i>People v. Jensen</i> , 55 P.3d 135 (Colo. App. 2001).....	8, 9, 10, 11, 15
<i>People v. Reynolds</i> , 159 P.3d 684 (Colo. App. 2006).....	18, 19
<i>People v. Spoto</i> , 795 P.2d 1314 (Colo. 1990).....	20
Statutes and Rules	
Colorado Rule of Criminal Procedure 52(b).....	19
Colorado Rule of Evidence 403	2, 12

Colorado Rule of Evidence 404(b) 2, 20
Colorado Rule of Evidence 807 1, 8, 10, 11, 12, 16, 17, 18, 19

I. Summary of the argument

By shutting down cross-examination of Mario Rivera, the only eyewitness, the trial court violated Villanueva's right to confront. The trial court erred in concluding that the impeachment was only marginally relevant. The impeachment directly contradicted Rivera's testimony about guns, and undermined Rivera's credibility by showing that Rivera lied under oath.

The error was not harmless beyond a reasonable doubt. Mario Rivera was the key witness. No other witness corroborated his testimony about the crime. Without his testimony, the prosecution case would have failed. Thus, the confrontation violation was reversible error.

It was also reversible error to admit Garcia's numerous hearsay statements. The court admitted them under the residual hearsay exception, CRE 807, but applied the legal standard incorrectly. In determining whether hearsay statements have sufficient guarantees of trustworthiness, the court may not consider other trial evidence. Instead, the inquiry focuses only on the circumstances surrounding the making of the statements. Here, the People failed to demonstrate guarantees of trustworthiness, and thus the statements were inadmissible. Their admission was not harmless error because the statements painted an unfairly prejudicial picture of Villanueva as a leader of a criminal drug enterprise.

The court also erred in allowing CRE 404(b) evidence of threats and drug-dealing. That evidence was substantially more prejudicial than probative and should have been excluded under CRE 403.

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

II. Argument

A. The trial court denied Villanueva his right to confront the only eyewitness in the case

1. Shutting down cross-examination of Rivera was a confrontation violation

An accused's right to confront the witnesses against him is a "bedrock procedural guarantee." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). That right "has been regarded as a fundamental right for hundreds of years. It was included in both the United States and Colorado Constitutions to insure that persons would not be convicted on the basis of *ex parte* testimony *and without the benefit of cross-examination.*" *People v. Fry*, 92 P.3d 970, 975 (Colo. 2004) (emphasis added). Cross-examination is the "greatest legal engine ever invented for the discovery of the truth." *Fry*, 92 P.3d at 979, quoting *California v. Green*, 399 U.S. 149, 158 (1970). "Thus, a witness's testimony on cross-examination may be much more damning to the witness's credibility than any sort of indirect

evidence the defense can offer. . . . [T]he opportunity for cross-examination is without equal as a tool in the search for truth.” *Fry*, 92 P.3d at 980. Recognizing both the bedrock nature of the right to confront and the central role of cross-examination in protecting that right, it is evident the trial court violated Villanueva’s right to confront.

Mario Rivera was the key to the prosecution case. Without his testimony, the prosecution’s case would have failed. Rivera’s credibility was thus critically important. The defense therefore had to have a fair opportunity to cross-examine Rivera and impeach that credibility. By shutting down the cross-examination of Rivera, the trial court denied Villanueva that opportunity, and thereby violated his right to confront.

The People argue that the issue of whether Rivera owned a gun and was familiar with guns “was only marginally relevant.” Answer Brief at 14. The People concede that the prior inconsistent statements “somewhat contradicted Rivera’s trial testimony about his ownership of and familiarity with guns,” but argue that the evidence “did not tend to establish Rivera’s bias, prejudice or motive for testifying against defendant.” *Id.* The People fail to appreciate that the evidence called into question Rivera’s veracity and credibility as a witness.

The prior inconsistent statements related to Rivera's ownership, use, and knowledge of guns. Since Rivera testified on direct (and cross) about the gun he claimed he saw Villanueva use, his knowledge and background with guns was more than "marginally relevant" to his earlier trial testimony and to his credibility.

Defense counsel noted that the statements he wished to cross-examine Rivera about were "impeaching of the fact . . . 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. The court denied the right to cross-examine on these facts, asserting the "evidence tends to impeach the character of the witness as opposed to the testimony." 10 R. at 114:10-12, App. 23. The court failed to see that the prior inconsistent statements directly impeached Rivera's previous answers in his testimony.

Rivera testified that he never owned a gun. 10 R. at 83:3-84:5. That testimony was contradicted by Rivera's statement to "Neo" where Rivera referred to "my gun." *Id.* at 99:7-8; App. 11. Rivera testified he had not "worked on guns," "taken a 9 millimeter apart," or "changed barrels." 10 R. at 84:16-21. This testimony was contradicted by his statements to Neo about getting rid of a gun barrel, and not liking revolvers because you couldn't get rid of the barrel. *See id.* at 99:7-25; App. 11. Rivera also testified that he did not have any working

knowledge of 9 millimeters. 10 R. at 82:25-83:2. The statements impeached his testimony by demonstrating that he had a working knowledge of guns, including 9 millimeters. *See* 99:7-25, 95:21-96:6, App. 11, 7-8. Since the statements directly impeached Rivera's testimony, the trial court erred in concluding they impeached only his character.

The People argue that "Rivera's credibility as an eyewitness would not have been undermined by evidence that he knew more than he claimed to know about guns or by evidence that he may have owned a gun." Answer Brief at 15. First, it is presumptuous to assert that Rivera's credibility would not have been undermined—that was for the jury to decide, not the court or the People. Second, the impeachment is important not simply because it showed that Rivera knew more about guns than he claimed, or that he may have owned a gun. Instead, the impeachment was crucial to show that Rivera lied under oath. Jurors could conclude from the impeachment that they should not believe Rivera's testimony, including his testimony about seeing the gun and witnessing the crime. That is precisely the point of cross-examination by prior inconsistent statements—to show a witness lacks credibility. *Fry*, 92 P.3d at 980 (testimony on cross-examination may be much more damning to the witness's credibility than any sort of indirect evidence). It was therefore a violation of the Confrontation Clause to not allow the

impeachment of Rivera. See *People v. Cobb*, 962 P.2d 944, 950 (Colo. 1998); *People v. Golden*, 140 P.3d 1, 6-7 (Colo. App. 2005); cf. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (“the focus of the prejudice inquiry in determining whether the confrontation right is violated must be on the particular witness, not on the outcome of the entire trial”).

2. The confrontation violation was not harmless beyond a reasonable doubt.

The People contend that even if there was a violation of Villanueva’s confrontation rights, the error was harmless beyond a reasonable doubt. See Answer Brief at 15. That position ignores the importance of Rivera’s testimony to the prosecution case.

To determine whether a confrontation violation is harmless error, the “correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” *Van Arsdall*, 475 U.S. at 684. The factors that go into the inquiry “include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted,

and, of course, the overall strength of the prosecution's case." *Id.* Applying these factors here, the error was not harmless beyond a reasonable doubt.

First, Rivera's testimony was the key to the prosecution case. Second, his testimony was not cumulative—it was the only eyewitness testimony and the only evidence identifying Villanueva as the shooter. Third, Rivera's testimony about the crime was uncorroborated. Fourth, the prosecution's case was not strong, and without Rivera's testimony, would not have been sufficient to obtain a conviction. Thus, the error was not harmless beyond a reasonable doubt. Villanueva's conviction therefore must be reversed and the case remanded for a new trial.

B. The trial court erred in allowing Garcia's hearsay statements

1. The issue is properly before the court

The People argue that this court should decline to address Villanueva's claims about the erroneous admission of Garcia's hearsay statements, asserting the claims were not properly stated in the Opening Brief. *See* Answer Brief at 18. The court should reject that argument.

The hearsay issue was addressed in a pretrial motions hearing. *See* 4 R. (transcript of motions hearing). The Opening Brief discussed, and attached, the People's Motion to Admit Hearsay Statements of Deceased Victim, Benjamin Garcia-Diaz. The Opening Brief addressed the hearing on the motion and the trial

court's rulings on the statements, including record citations to the court's rulings and reasoning. The Opening Brief discusses only those hearsay statements that were also admitted at trial. Statements ruled admissible at the hearing but not admitted at trial were not discussed. Finally, in discussing the hearsay statements below, Villanueva cites where each statement was admitted at trial. Accordingly, the issue has been fully raised and argued in the briefs, and this court has been directed to the relevant parts of the record, the pleadings, the hearing transcript, and the trial transcripts. Thus, the issue is properly before this court.

2. It was reversible error to allow Garcia's hearsay statements

In arguing the statements were admissible under CRE 807, the People set forth the correct legal standards from *People v. Fuller*, 788 P.2d 741 (Colo. 1990) and *People v. Jensen*, 55 P.3d 135 (Colo. App. 2001). Unfortunately, the People, like the district court, misapply the standards, relying on other trial evidence to support admissibility of the statements. That is improper.

Under *Fuller*, 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. *Fuller*, 788 P.2d at 744. The first element—the statement is supported by guarantees of trustworthiness—was applied incorrectly by the district court and by the People.

In *Jensen*, the court said, “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.” 55 P.3d at 139. The “particularized guarantees of trustworthiness” must be shown from the totality of the circumstances, but “the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” *Bernal v. People*, 44 P.3d 184, 197 (Colo. 2002), quoting *Idaho v. Wright*, 497 U.S. 805, 819 (1990). “A court may *not* refer to other evidence at trial when assessing the particularized guarantees of trustworthiness.” *Bernal*, 44 P.3d at 197 (emphasis in original), citing *Idaho v. Wright*, 497 U.S. at 822.¹ Here, both the

¹ While *Bernal* was a confrontation case, the analysis is the same for the residual hearsay rule. *Jensen*, like *Bernal*, cites *Idaho v. Wright* for the proposition that the relevant circumstances include only those that surround the making of the statement. *Jensen*, 55 P.3d at 139. See also *Fuller*, 788 P.2d at 745 (analysis examines the character of the statement, the relationship of the parties, the

trial court and the People refer to other evidence in assessing the trustworthiness of the victim's hearsay statements. That is error.

a. Hearsay statements to Mario Rivera

According to Mario Rivera, Garcia told him that the cocaine found at Garcia's house was Villanueva's, and Garcia said he owed Villanueva about \$30,000. *See* 1 R. at 18, App. 24; 10 R. at 58:4-60:11. In allowing these statements under CRE 807, the trial court improperly considered other evidence. The court noted, "The cocaine was found . . . at the victim's home, and where it was found, and how it was found in the course of a lawful search. I think that's corroborative." 4 R. at 32:10-13. As for the \$30,000, the court noted, "that can get tied to the cocaine at the same time. It's part and parcel of that statement and I think likewise admissible for the same reason." *Id.* at 32:14-16. The court's analysis focused on other evidence the court believed corroborated what the victim said. But under *Bernal*, *Jensen*, and *Wright*, that is exactly what the court is *not* supposed to do. Instead, the court must focus on "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

probable motivation of the declarant in making the statement, and the circumstances under which the statement was made).

made.” *Jensen*, 55 P.3d at 139. The People make the same mistake in the Answer Brief. *See* Answer Brief at 20-21.

Applying the proper standard, the statement does not satisfy CRE 807. The statement was self-serving. At the time it was made, the police had already seized nearly two kilograms of cocaine from Garcia’s house. By claiming the cocaine was not his but Villanueva’s, Garcia attempted to shift blame away from himself and towards Villanueva. Garcia had a strong motivation to lie about who owned the cocaine.

The People assert that the statements were not self-serving because they were strong evidence Garcia knowingly possessed drugs. Answer Brief at 21. But Garcia made the statement to Rivera after Garcia was arrested for having the drugs in his house. 10 R. at 59:4-25. Garcia therefore had every motivation to lie about whose cocaine it was, as he was already facing substantial criminal liability when he made the statement. The circumstances under which the statements were made thus show a lack of trustworthiness. Therefore, it was error to admit the statements.

b. Hearsay statements to Juan Garcia

At trial, Juan Garcia testified that his brother said (1) he had been getting cocaine from Villanueva for about two or three years; (2) he sold two to three, and

as many as five, kilos of cocaine a week for Villanueva; (3) the price per kilo was \$18,000, and he would sell it for \$25,000; (4) the cocaine was 96-97 % pure. *See* 10 R. at 252:17-254:12; *see also* 1 R. at 19, App. 25; Answer Brief at 22.

At the pretrial motions hearing, the court noted only that these statements appeared to “deal with the existence of the criminal enterprise.” 4 R. at 34:8-10. The prosecution characterized them as Garcia describing “the business” to Juan.² The court then said the “\$30,000 comes back into play here, and makes more sense when you tie the two together.” *Id.* at 34:11-18. The court went on to address two statements in the motion that he was concerned about and ultimately ruled them inadmissible.³ The court, however, allowed the other statements without analyzing them or making findings under *Fuller*.

The People argue the statements were admissible under CRE 807 based on Juan Garcia’s testimony that he saw his brother and Villanueva with cocaine, scales, and bags, in his brother’s house, and saw his brother give Villanueva a bag of \$30,000-\$40,000 in cash. Answer Brief at 22. The People also assert that the

² References to the deceased are to “Garcia.” References to witnesses’ first name are used to avoid confusion.

³ Those statements had to do with “cooking crack” at Garcia’s mother’s house and Garcia traveling to Juarez, Mexico with “sacks of Defendant’s drug money.” The court excluded these statements as being cumulative and under CRE 403. *See* 1 R. at 19 (7th and 8th bullet points), App. 25; 4 R. at 34:19-37:16.

statement was against Garcia's penal interest and was made to his brother, so Garcia had no motivation to lie.

First, other evidence of drug activity cannot be considered in the trustworthiness analysis, so Juan Garcia's testimony on that cannot be part of the analysis. *See Bernal*, 44 P.3d at 197. Second, while on its surface the statement may appear to have been against Garcia's penal interest, at the time the statement was made, Garcia was regularly supplying drugs to his brother. *See* 10 R. at 252:17-253:9. Juan Garcia was dealing a kilo or two a week and was getting the drugs from his brother once or twice a week. *Id.* at 251:1-21. In light of the fact that Juan already knew of Garcia's drug-dealing, Garcia's statements were not against his penal interest.

Nor does the fact that the statements were made to Garcia's brother make them any more believable. The People assert that there is no indication the victim had any sort of motive to lie about dealing drugs. But it is the People's burden to show the statements had trustworthiness. Family members often lie to each other, whether to conceal bad news, to make themselves seem less culpable to loved ones, or to appear to be less of a "bad actor." Thus, the fact that Garcia made the statements to his brother does not indicate a motive to tell the truth. Under the circumstances, the People have not demonstrated sufficient evidence of

trustworthiness in the statements. Therefore, it was error for the court to admit them.

The next two statements Garcia made to his brother were (1) when Garcia left his house on December 19, 2004, he took \$30,000 with him; and (2) he gave Villanueva the \$30,000 but still owed him \$30,000. *See* 10 R. at 264:24-266:6; 1 R. at 19-20, App. 25-26. At the motions hearing, the court allowed these statements, noting that they made the “\$30,000 reference by Martin Villanueva much more contextualized, more understandable, and provides . . . some corroboration and substantiation for that.” 4 R. at 37:19-24. Again, the court applied an incorrect analysis, focusing on “corroborating” evidence, which is improper under *Bernal*. Under the correct test, the statements are inadmissible.

Garcia made the statements on the night of December 19, 2004, after “he got busted” and the police had seized the drugs from his house. 10 R. at 259:5-16. The timing indicates that the statements are self-serving. Garcia knew he was in trouble as a large quantity of cocaine had been seized from his home. The statements try to show that the drugs were not Garcia’s but Villanueva’s, thereby deflecting blame away from Garcia and placing it on Villanueva. Under the circumstances, Garcia had a strong motive to lie. Thus, the statements were not trustworthy and should not have been admitted.

Juan Garcia also testified that Garcia told him, “if I ever disappear, if I go missing, it was Martin Villanueva.” 10 R. at 273:2-8.⁴ Juan said that Garcia told him this before the drugs were found.⁵ The trial court allowed the statement, concluding only that it “goes to motive.” 4 R. at 39:9-13. The court thus viewed only the relevance of the statement, without analyzing its trustworthiness.

The People argue the statement is admissible because of “circumstantial guarantees of trustworthiness.” Answer Brief at 26. But the People again rely only on other evidence to support their position, contrary to *Bernal, Jensen*, and *Idaho v. Wright*. Applying the proper standard, the court erred in allowing the statement.

It is not clear when or where the statement was made, nor is it clear what the context was. The People thus have failed to prove that the circumstances surrounding the making of the statement have guarantees of trustworthiness.

While Garcia’s motivation for making it arguably could have been fear of Villanueva, there is no evidence that Garcia was fearful or scared when he made

⁴ As set forth in the People’s motion, Garcia statements were, “if he was ever killed Martin would be the person that killed him,” and “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.” 1 R. at 20, App. 26.

⁵ In their motion, which is surely based on police reports, the People assert that the first time Garcia said this was in December 2004. 1 R. at 20, App. 26. That was the same month the drugs were seized from Garcia’s house.

the statement. Since the circumstances surrounding the statement do not provide sufficient guarantees of trustworthiness, it was not admissible under CRE 807.

c. Hearsay Statements to Ilda Garcia

The statements to Garcia's sister Ilda similarly lack guarantees of trustworthiness. Ilda testified that Garcia got his drugs from Villanueva. *See* 11 R. at 75:9-13. Ilda also testified that she had a conversation with Garcia about the drugs found in his house. She asked Garcia, "how much he owed Martin for the drugs. . . . [H]e told me, I don't owe him anything, but he wants me to kill Gloria [his wife] for the drugs, or if he didn't kill Gloria, then he would kill me." *Id.* at 79:5-17. (When asked to clarify this testimony, Ilda stated that Garcia said, "If I don't kill Gloria, Martin is going to kill me." *Id.* at 79:14-17.)

At the motions hearing, the district court allowed both statements, again without applying the *Fuller* standard properly. 4 R. at 39:24-40:20. The statement that Garcia got his drugs from Villanueva lacks trustworthiness for the same reasons as the similar statements made to Juan Garcia.

The second statement also lacks trustworthiness. First, it was made after the drugs were found in Garcia's house. The statement is self-serving because it suggests that Garcia owed a drug debt to Villanueva, and thus indicates the drugs were Villanueva's not Garcia's. It thereby attempts to shift blame away from

Garcia. Second, the statement was made at a time where Garcia was very upset at his wife Gloria because she had “turned him in.” Garcia thus had motivation to “get even” with Gloria, but to blame Villanueva for it. Accordingly, the statement lacked sufficient guarantees of trustworthiness, and should not have been admitted.

d. Hearsay statement to Mary Garcia

Garcia’s sister-in-law, Mary, testified that Garcia said he was scared for his family. *See* 11 R. at 64:1-12. The People argue this statement had sufficient guarantees of trustworthiness, based on Juan Garcia’s testimony about alleged threats by Villanueva. *See* Answer Brief at 28. Again, such evidence cannot be used to establish guarantees of trustworthiness. *See Bernal, supra.*

The statement was made after the drugs were seized from Garcia’s house and when he was wanted on a warrant. *See* 11 R. at 58:11-21. Mary testified that Garcia did not tell her why he was afraid for his family. *Id.* at 64:8-12. His fear certainly could have been the result of being a fugitive rather than because of Villanueva. Thus, the People failed to show the circumstances surrounding the statement had sufficient guarantees of trustworthiness for admission under CRE 807.

e. Conclusion on hearsay statements

i. Villanueva states both a confrontation claim and an evidentiary one

The People assert it is unclear whether Villanueva asserts a confrontation claim or an evidentiary one. *See* Answer Brief at 15-16. He asserts both. The Opening Brief states that the erroneous admission of the hearsay statements under CRE 807 violated Villanueva's confrontation rights. Opening Brief at 20, 28. Thus, the Opening Brief clearly raises a confrontation claim for statements the trial court erroneously admitted under the residual hearsay exception (the evidentiary error).

After *Davis v. Washington*, 547 U.S. 813 (2006), admission of non-testimonial hearsay statements does not implicate the federal Confrontation Clause. *See People v. Reynolds*, 159 P.3d 684, 690 (Colo. App. 2006). But such statements are still subject to confrontation analysis under the state constitution. *Id.* Under the state constitution, such statements are inadmissible unless the prosecution shows that the declarant is unavailable and that the statement bears sufficient indicia of reliability under the test of *People v. Dement*, 661 P.2d 675 (Colo. 1983), *overruled in part by Fry, supra. Reynolds*, 159 P.3d at 690.

The People are correct in noting that the hearsay issue was not raised as a confrontation issue during the pretrial motions hearing. *See* Answer Brief at 17.

The confrontation issue, however, may still be raised on appeal as a claim of plain error. *See* Crim. P. 52(b). By addressing the issue in the Opening Brief, Villanueva has properly raised it.

But to a large degree, analysis of the residual hearsay exception and the confrontation analysis are the same. Both require examining whether the hearsay statements have particularized guarantee of trustworthiness. *See Fuller*, 788 P.2d at 744 (residual hearsay exception); *Reynolds*, 159 P.3d at 690 (confrontation).

ii. It was reversible error to allow the hearsay statements

As discussed above, the trial court improperly considered evidence beyond the circumstances of the statement itself in finding the various statements admissible under CRE 807. Properly analyzed, the statements lack guarantees of trustworthiness, and thus the trial court erred in admitting them.

The errors were not harmless. The statements paint a picture of Villanueva as a leader of a criminal drug enterprise, and thereby provided unfair support to the prosecution theory that Villanueva killed Garcia over a drug debt or drug-dealing. Without these inadmissible statements, the prosecution theory rested on a thin reed consisting essentially of Rivera's testimony. No physical evidence tied the shooting to Villanueva. No weapon was found. No shell casings, no blood, or any other physical evidence was found at the Jason Street location where Rivera

claimed the crime occurred. The statements assassinated Villanueva's character, and did so repeatedly. The effect on the jury was substantial. Therefore, the admission of the hearsay statements was reversible error.

C. The trial court erred in admitting CRE 404(b) evidence.

The People first argue the court should decline to address this issue. *See* Answer Brief at 28-29. That argument should be rejected, as the issue was properly raised in the Opening Brief. The only CRE 404(b) evidence challenged on appeal is evidence that was ruled admissible at the hearing and later admitted at trial. The Opening Brief argued that it was error for that evidence to be admitted under Rule 404(b) and *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). Thus, Villanueva properly presented the claim, and the court should address its merits.

At trial, Juan Garcia was allowed to testify extensively about alleged drug dealing and threats by Villanueva (including the hearsay statements discussed above). *See* 10 R. at 252:6-273:12. All the 404(b) evidence Juan Garcia testified about was listed in the People's 404(b) notice. *See id.*; 1 R. at 34-36, App. 28-30; *see also* Opening Brief at 30-31. As explained in the Opening Brief, that evidence was highly inflammatory evidence about drug trafficking. It was substantially more prejudicial than probative and therefore should have been excluded. *See* Opening Brief at 29-31.

D. Cumulative error requires reversal

The multiple errors by the trial court amount to cumulative error that deprived Villanueva of his right to a fair trial. *See People v. Botham*, 629 P.2d 589, 603 (Colo. 1981). Therefore, reversal is warranted.

III. Conclusion

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

Respectfully submitted this 19th day of December, 2008.



Blain D. Myhre
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2008, a true and correct copy of the above and foregoing **REPLY BRIEF** was served, postage prepaid via U.S. Mail, addressed to the following:

Susan E. Friedman, Esq.
Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

Charles W. Elliott, Esq.
1801 Broadway, Suite 1100
Denver, Colorado 80202

