

COURT OF APPEALS,  
STATE OF COLORADO

Colorado State Judicial Building  
Two East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

Adams County District Court  
Honorable Thomas R. Ensor & C. Vincent Phelps  
Case Number 08CR838

THE PEOPLE OF THE  
STATE OF COLORADO

Plaintiff-Appellee

v.

TIMOTHY NEAL VALLEJOS

Defendant-Appellant

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▲ COURT USE ONLY ▲

Case Number: 09CA678

**OPENING BRIEF OF DEFENDANT-APPELLANT**

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Colorado State Judicial Building Two East 14<sup>th</sup> Avenue Denver, Colorado 80203</p>	
<p>Adams County District Court Honorable Thomas R. Ensor &amp; C. Vincent Phelps Case Number 08CR838</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>TIMOTHY NEAL VALLEJOS</p> <p>Defendant-Appellant</p>	<p>▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;"><b>CERTIFICATE OF COMPLIANCE</b></p>	

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

Choose one:

- It contains 6,596 words.
- It does not exceed 30 pages.

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.\_\_\_\_, p.\_\_\_\_), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

A handwritten signature in black ink, appearing to read "Mark Evans", with a long horizontal flourish extending to the right.

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## INTRODUCTION

Defendant-Appellant, Timothy Neal Vallejos, was the defendant in the trial court and will be referred to by name. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal.

## STATEMENT OF THE ISSUES PRESENTED

I. A lay witness may not testify to opinions or inferences based on scientific, technical, or specialized knowledge. Here, a lay witness testified to an opinion based on specialized knowledge — specifically, that footwear impressions left at a crime scene “matched” Mr. Vallejos’s shoe, and that nearby tire impressions came from his truck. Did the district court err by allowing a lay witness to testify regarding these comparisons?

II. Trial courts can admit evidence of a defendant’s uncharged acts only after completing the analyses prescribed in *People v. Garner* and *People v. Spoto*. Here, the district court admitted evidence of Mr. Vallejos’s prior acts without conducting either the *Garner* or the *Spoto* analysis. Did the district court err by admitting this evidence?

III. Prosecutors may not misstate the law in closing argument. Here, the prosecutor stated in closing that whether Mr. Vallejos acted “knowingly” required

determining whether he was “out of his mind” or “sleepwalking.” Did the trial court err by overruling an objection to this statement?

### **STATEMENT OF THE CASE**

The State charged Mr. Vallejos with second degree burglary, a class four felony under section 18-4-203(1), C.R.S. 2009, and possession of burglary tools, a class five felony under section 18-4-205(1), C.R.S. 2009. (Vol.I, p.1) He pleaded not guilty to both charges. (Vol.I, p.61)

Mr. Vallejos filed motions prior to trial, including a “Notice of Objection to Admission of any Crimes Wrongs or Acts.” (Vol.I, p.16) The district court ruled on several motions following a hearing on November 7, 2008. (Vol.VI, pp.29-31) However, the record contains no indication that Mr. Vallejos’s Notice of Objection was ever addressed.

A jury acquitted Mr. Vallejos on the possession of burglary tools charge, but convicted on the burglary charge. (Vol.I, pp.41-42) The district court sentenced Mr. Vallejos to four years of probation (Vol.I, p.48), and this timely appeal ensued.

## STATEMENT OF THE FACTS

Commerce City police responded to a call in the late morning on Friday, March 14, 2008, indicating a possible burglary in progress at Nick's Landscaping. (Vol.VI, p.4-5) Employees at a nearby palate recycling company had called them to report that an individual in a red truck was removing metal racks from the property. (Vol.VIII, pp.126-27) One of those employees pointed the first police car to arrive toward Mr. Vallejos's truck and stated, "That's him." (Vol.VIII, pp.190-91)

The officers had "limited information" when they arrived. (Vol.VI, p.6) Nevertheless, Officer Couture stopped Mr. Vallejos, ordered him out of his truck, and conducted a pat down. (Vol.VI, p.6) She then asked him what he was doing there (Vol.VI, p.8), and he responded that he was in the business of collecting scrap metal and had been given permission to take the metal racks he had in his truck from a nearby shed. (Vol.VIII, pp.200-01)

Officer Keadle spoke to the owner of Nick's Landscaping — who had by then arrived at the scene — and learned that the owner had not given anyone permission to take the racks. (Vol.VI, p.16) Another officer reported to Officer Keadle that there were signs of forced entry into the shed from which the racks had come. (Vol.VI, p.17) Based on this information, Officer Keadle took Mr. Vallejos into custody. (Vol.VI, p.17) Police conducted an inventory search of Mr. Vallejos's truck

after arresting him and found a pair of wire cutters and a set of bolt cutters.

(Vol.VIII, p.203)

Officer Keadle transported Mr. Vallejos to the police station and questioned him about the incident. Mr. Vallejos repeated his story to the officer:

Again, he went into detail telling us that he collected scrap metal. He had come by the property the day before and observed a man on a forklift. Explained to him that he was looking for scrap metal. The man on the forklift pointed out a stack of racks in a shed and told him that he could have the racks that were inside of that shed.

(Vol.VIII, pp.206-07) Mr. Vallejos explained that he had asked the man on the forklift if he was an employee of Nick's Landscaping, and the man said that he was.

(Vol.VIII, p.207)

Mr. Vallejos's defense at trial was the same as his statements to police: a man on a forklift gave him permission to take some of the metal racks in the shed the day before he was arrested. (Vol.IX, pp.63-64) Trial testimony revealed that the seven-acre lot on which Mr. Vallejos was arrested was only seasonally used by Nick's Landscaping, and that they were not using it at the time of the arrest. (Vol.VIII, pp.149-50) The palate recycling business next door and a nearby trucking company both used and parked trucks on the lot when Nick's was not employing it. (Vol.VIII, pp.125, 150-51) Additionally, the palate business owned several forklifts. (Vol.VIII, p.132) The owner of Nick's Landscaping testified that he had not given Mr. Vallejos

permission to take anything from the premises. (Vol.VIII, pp.185-86) However, his testimony indicated that he was not personally present at the property for much of the business day during that time of year. (Vol.VIII, pp.174, 186)

### **SUMMARY OF THE ARGUMENT**

At the heart of this case is a dispute over whether Mr. Vallejos had permission to remove and recycle metal racks from a shed on the property of Nick's Landscaping. Mr. Vallejos asserted that he had such permission when first confronted by police, when interviewed at the police station, and when on trial for burglary.

The district court improperly allowed admission of evidence tending to weaken Mr. Vallejos's theory of defense. First, the court allowed a lay witness to testify regarding footwear impression and tire impression analysis. What resulted was expert testimony under the guise of lay opinion. The defense was unable to effectively cross-examine the witness because he was never qualified as an expert and his anticipated testimony was not revealed to Mr. Vallejos in advance of trial.

Second, the district court improperly admitted evidence of uncharged acts by Mr. Vallejos. It did so without either determining by a preponderance of the evidence that it was Mr. Vallejos who had perpetrated these acts, or evaluating whether they were relevant and properly admitted. This error created the possibility that Mr.

Vallejos was convicted not for his conduct but for the jury's perception of his character.

Finally, the district court allowed the prosecutor to misstate the law regarding the mens rea necessary for the crime of burglary during closing argument.

## ARGUMENT

I. A lay witness may not testify to opinions or inferences based on scientific, technical, or specialized knowledge. Here, a lay witness testified to an opinion based on specialized knowledge — specifically, that footwear impressions left at the crime scene “matched” Mr. Vallejos’s shoes, and that tire impressions came from his truck. The trial court erred by allowing that testimony to come from a lay witness.

### A. Standard of Review

Trial counsel preserved this issue for appellate review through contemporaneous objection. (Vol.IX, pp.22-25) Counsel first objected when the State’s direct examination of the witness turned to tire marks. At that point he stated, “Objection, Your Honor. I believe that’s getting into the area of expert testimony.” (Vol.IX, p.22) Counsel renewed his objection when testimony shifted to footwear impression analysis. (Vol.IX, pp.24, 25)

A trial court’s rulings on evidentiary issues are reviewed for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993).

A ruling erroneously admitting or excluding evidence is reversible when it affects a substantial right of the party against whom the ruling is made. *See* CRE 103(a); *Stewart*, 55 P.3d at 124. An appellate court cannot deem an error harmless unless it can say with fair assurance that, in light of the record as a whole, the error did not substantially influence the verdict or impair the fairness of the trial. *See Stewart*, 55 P.3d at 124.

A trial court's erroneous evidentiary decisions may so greatly impair the fairness of a trial that a defendant's federal constitutional rights are implicated. *See, e.g., People v. Pronovost*, 773 P.2d 555, 558 (Colo. 1989). A reviewing court may not hold federal constitutional error harmless unless it is able to declare a belief that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Krutsinger v. People*, \_\_\_ P.3d \_\_\_, \_\_\_ (Colo. No. 08SC378, October 13, 2009).

## B. Applicable Law

### 1. Expert Testimony

The Colorado Rules of Evidence protect litigants from surprise attacks by "expert" witnesses offering their opinions on evidence. *See Stewart*, 55 P.3d at 123, n.10. Parties cannot adequately cross-examine testimony involving scientific or highly technical concepts unless they are warned in advance that such testimony will be delivered, and are given the opportunity to prepare. Rules differentiating expert and

lay opinions, as well as special discovery procedures required prior to the presentation of expert testimony, prevent the intellectual ambush associated with unannounced expert opinions. *See id.*

When a witness testifies regarding his or her opinions or inferences, that testimony must conform to the parameters of either CRE 701 or 702. Under CRE 701, a lay witness — one not testifying as an expert — may give opinions that are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

Testimony based on scientific, technical, or other specialized knowledge can only be given by an expert within the meaning of CRE 702. Courts must conduct a careful analyses to ensure the reliability and relevancy of expert testimony. *See, e.g., People v. Shreck*, 22 P.3d 68, 78 (Colo. 2001). For instance, when courts must determine whether scientific evidence is admissible under CRE 702, they inquire regarding “(1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury.” *Id.*

Additionally, witnesses can only testify as experts if the contents of their testimony are revealed before trial. The State must provide notice of every witness that it intends to call at trial. § 16-5-203, C.R.S. 2009; Crim. P. 16(I)(a)(1)(VII). If the

State intends to call an expert, however, it must also provide notice at least thirty days before trial of any statements or reports by the expert “made in connection with the particular case, including results of physical or mental examinations and of scientific tests; experiments, or *comparisons*.” Crim. P. 16(I)(a)(1)(III), (b)(3) (emphasis added); *People v. Jowell*, 199 P.3d 38, 48 (Colo. App. 2008).

In sum, special rules apply when expert testimony is involved. Those rules — most notably *Shreck* hearings and enhanced discovery requirements — protect both individual defendants and the State from the unfairness associated with surprise attacks by witnesses purporting to command specialized scientific or technical knowledge. See Crim. P. 16(I)(a)(1)(III), (II)(b); *Stewart*, 55 P.3d at 123, n.10.

When courts determine whether evidence is properly admitted as expert or lay testimony, the critical question is whether the testimony is based upon specialized knowledge. *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2006). “A person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by an ordinary person.” *Id.* (citations omitted). When assessing whether this is the case, courts should consider whether ordinary citizens can be expected to know certain information and have certain experiences. *Id.* at 983. Additionally, courts should consider whether the opinion results from a

process of reasoning used in everyday life or a process of reasoning that can only be mastered by specialists in a field. *Id.*

Police officers may testify either as experts in scientific or technical matters or as lay witnesses based on their own perceptions. *See Stewart*, 55 P.3d at 123. Officer testimony becomes objectionable, however, when what is essentially expert testimony is improperly admitted under the guise of a lay opinion. *Id.* Accordingly, the Colorado Supreme Court has held that where an officer's testimony "is based not only on her perceptions and observations of the crime scene, but also on her specialized training or education, she must be properly qualified as an expert before offering testimony that amounts to expert testimony." *Id.* at 124. Such was the case here.

## 2. Footwear and Tire Impression Analysis

Specialized training and education is required to compare and match crime scene footwear impressions to known pieces of footwear. Hence, witnesses testifying regarding footwear impressions are regularly qualified as experts. *See, e.g., Golob v. People*, 180 P.3d 1006, 1009 (Colo. 2008) ("At trial, the district court certified [Agent] Sollars as an expert in the examination and comparison of known footwear to footwear track impressions."); *People v. Fears*, 962 P.2d 272, 284 (Colo. App. 1997); *People v. Perryman*, 859 P.2d 263, 267 (Colo. App. 1993) ("CRE 702 is the appropriate test to determine the admissibility of the shoe identification and comparison . . .").

The *Physical Evidence Handbook* — created by the Colorado Bureau of Investigation (CBI) — lists detailed procedures for locating, preserving, and collecting footwear impressions. Colorado Bureau of Investigation, *Physical Evidence Handbook* XI-1 (2007), available at [http://cbi.state.co.us/lab/pdf/Physical\\_Evidence\\_v5\\_1.pdf](http://cbi.state.co.us/lab/pdf/Physical_Evidence_v5_1.pdf). A forensic laboratory at CBI then conducts the comparison and issues a report regarding the likelihood of a match. *Id.* at XI-6. Additionally, highly technical reference manuals exist for the collection and analysis of footwear impression evidence. See William J. Bodziak, *Footwear Impression Evidence: Detection, Recovery, and Examination* (2d ed. 2000).

Similarly, tire impression comparison is a skill requiring specialized training or education. Courts have admitted evidence of tire impressions through experts. See *People v. Aragon*, 643 P.2d 43, 44-45 (Colo. 1982). As with footwear impressions, CBI has complex procedures in place for collecting tire tread impressions and a laboratory conducts the subsequent comparison. See *Physical Evidence Handbook* at XI-1, XI-6. Tire impression literature contemplates that those who testify to tire track comparisons will be qualified as experts. William J. Bodziak, *Tire Tread and Tire Track Evidence: Recovery and Forensic Examination* 261 (2008) (“When you take the stand and qualify as an expert in the area of tire impression evidence, keep in mind that most jurors will not have much of an idea what this examination involves.”).

Colorado's caselaw, crime labs, and forensic reference manuals all project the same message regarding footwear and tire impression comparisons: not just anybody can perform them. Matching an impression on the ground to a particular shoe or tire is an exercise that requires specialized training or education. *See Stewart*, 55 P.3d at 124. Thus, courts must qualify police officers as experts under CRE 702 before they can opine on such evidence. Only through expert qualification can courts properly evaluate the relevance and reliability of impression comparisons, *see Shreck*, 22 P.3d at 78, and provide parties with the advance warning they need to effectively cross-examine such technical testimony, *see* Crim P. 16(I)(a)(1)(III), (b)(3).

### C. Application

The State called Officer Brian Trujillo in its case against Mr. Vallejos. Officer Trujillo's role in the investigation was to take photographs of the crime scene. (Vol.IX, p.13) He testified at trial that he observed inside the shed "footprints that appeared to be fresh" leading away from the "point of entry." (Vol.IX, p.16) The footprints led to larger bay doors from which the metal racks were ultimately removed. (Vol.IX, p.16) Additionally, he testified that he observed tire marks on the ground near the "big, open area" of the shed. (Vol.IX, p.22)

The State asked Officer Trujillo if he was able to "decipher anything from those tire marks?" (Vol.IX, p.22) He replied that they "appeared to match the tires

that were from the suspect's vehicle." (Vol.IX, p.22) Defense counsel immediately objected that this was "getting into the area of expert testimony," and the district court requested that the State "lay a foundation." (Vol.IX, p.22) The State responded by eliciting sparse testimony that: (1) the officer took photographs of Mr. Vallejos's truck tires, and (2) the officer had compared tires in his previous "training and experience." (Vol.IX, p.23) The district court then admitted Officer Trujillo's testimony and clarified that Mr. Vallejos's objection was overruled. (Vol.IX, p.23)

Officer Trujillo's testimony turned to footwear impressions after the State admitted a photograph of "a footprint in the dirt." (Vol.IX, p.24) The prosecutor asked Officer Trujillo if in his "15 years of working with burglary cases, have you ever been *trained . . .*" in comparing footprints to someone's shoe. (Vol.IX, pp.24-25 (emphasis added)) The Officer replied that he had and then testified — over Mr. Vallejos's objection — that "the footprints made in the dirt matched the shoes that the defendant was wearing." (Vol.IX, p.25)

The conclusions to which Officer Trujillo testified — matches between the tire marks and the tires and the footwear impressions and the shoes — could not have been made without specialized education and training. The act of taking a "footprint in the dirt" and conducting a footwear impression comparison to establish a "match" with a known piece of footwear is beyond a layman's capability. Evaluating the subtle

distinctions in tread, wear pattern, gait, and weight distribution that allow a “match” between a shoe and a shoe print is not a process of reasoning familiar to everyday life. *See Rincon*, 140 P.3d at 983. Rather, this type of evaluation is typically conducted by highly trained professionals, Bodziak, *Footwear Impression Evidence* at 376 (“It is important that the examiner be afforded specific training and experience in the field of footwear impression examination.”), in a laboratory environment, *Physical Evidence Handbook* at XI-1 to XI-8.

Officer Trujillo was providing expert testimony under the guise of a lay opinion. His testimony was based on not only his “perceptions and observations of the crime scene, but also on [his] specialized training or education . . . .” *See Stewart*, 55 P.3d at 124. Indeed, the State attempted to bolster the jury’s confidence in Officer Trujillo’s analysis by emphasizing his years of training in the area. (Vol.IX, pp.23-25) Therefore, Officer Trujillo should have been qualified as an expert before offering the testimony, *see Stewart*, 55 P.3d at 124, and the protections associated with expert testimony should have applied. *See, e.g.*, Crim. P. 16(I)(a)(1)(III); *Shreck*, 22 P.3d at 78.

Instead, the protections associated with expert testimony were not applied because the district court did not properly admit Officer Trujillo’s testimony in accordance with CRE 702. The record gives no indication that his statements or reports were disclosed before trial, *see* Crim. P. 16(I)(a)(1)(III), or that the district

court verified the reliability and relevance of his testimony, *see Shreck*, 22 P.3d at 78. Thus, the district court abused its discretion by overruling Mr. Vallejos's objections to testimony regarding footwear impression and tire impression comparisons.

The district court's abuse of discretion rose to the level of constitutional error. By not applying the protections associated with expert testimony, the district court impeded Mr. Vallejos's ability to effectively confront a witness against him. *See* U.S. Const. amend. VI, XIV; *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (ultimate goal of the Confrontation Clause is to ensure reliability through cross-examination); *Krutsinger*, \_\_\_ P.3d at \_\_\_ (error in limiting a defendant's ability to challenge the credibility of the evidence against him implicates the basic right to have the prosecutor's case survive meaningful adversarial testing). Additionally, Officer Trujillo's testimony implicated Mr. Vallejos's right to present a defense. U.S. Const. amend VI, XIV; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (the Constitution guarantees defendants a meaningful opportunity to present a complete defense).

#### D. Harm

The district court's error in admitting the testimony was not harmless. Mr. Vallejos maintained from the start that he had permission to take the metal racks that were found in his truck. He made the same argument when first contacted by police (Vol.VIII, pp.200-02), when interviewed at the station (Vol.VIII, pp.206-07), and in

closing argument at trial (Vol.IX, pp.63-64). Officer Trujillo's testimony was devastating to Mr. Vallejos's defense because it undermined his insistence that he had permission to enter the shed and take the racks.

The State used Officer Trujillo's testimony to establish that a small door on the east side of the shed was the alleged burglar's "point of entry," and then argued that this was not the way someone with permission would have entered. (Vol.IX, pp.57-58) The prosecution asked the officer whether someone with permission would have taken this path, and he testified that there was an "easier route." (Vol.IX, pp.18-19) The district court's error in admitting Officer Trujillo's testimony was exacerbated by the State's closing argument. There, the State used the "fresh footprints and fresh tire prints" in an attempt to show that Mr. Vallejos entered by way of the smaller door, worked his way to the front of the shed, and then unlocked and opened the larger doors from the inside. (Vol.IX, pp.18, 54-58) Based on the jury's verdict, the State's argument was successful. *See Merritt v. People*, 842 P.2d 162, 169 (Colo. 1992) (the importance of a witness's testimony to the prosecution's case is a valid consideration in determining whether erroneous admission was harmless).

Officer Trujillo's testimony likely influenced the jury's verdict. This case was, at heart, an evaluation of Mr. Vallejos's credibility: he steadfastly maintained that he had permission and the State argued that he did not. Because Mr. Vallejos did not

have the benefit of pretrial disclosure of the Officer Trujillo's testimony and the bases of his opinions, he did not have the opportunity to evaluate that testimony in advance of trial or to obtain his own expert witness. *See People v. Veren*, 140 P.3d 131, 140 (Colo. App. 2005) (holding that police officers' expert testimony under the guise of lay opinion was not harmless error). This lack of opportunity to prepare impinged upon Mr. Vallejos's ability to refute the officer's testimony, thereby causing him to lose credibility with the jury.

Under these circumstances this Court cannot determine with any assurance that, "in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial . . . ." *See Stewart*, 55 P.3d at 124; *Veren*, 140 P.3d at 140. Nor can this Court determine that the error was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24. Consequently, reversal is required. *See Stewart*, 55 P.3d at 124.

E. Even if Officer Trujillo was not giving expert testimony, his testimony lacked the foundation necessary for admission under CRE 701

Even if this Court disagrees that Officer Trujillo's testimony was that of an "expert," it was still improperly admitted. Lay opinion testimony under CRE 701 must be "rationally based on the perception of the witness . . . ." *See also* CRE 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."). A witness must

provide some foundation — or reason to believe that testimony is rationally based on his or her perceptions — along with his or her opinion. *See, e.g., People v. Souva*, 141 P.3d 845, 850 (Colo. App. 2005) (“Colorado law is well established that once the proper foundation has been laid, a lay witness may express an opinion as to whether a defendant was under the influence of alcohol.”); *Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996) (“a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.”).

Here, Officer Trujillo did not provide the foundation on which he based his opinions. He testified that he photographed and compared the footwear and tire impressions on the ground to Mr. Vallejos’s shoes and tires, and that he had training in how to do this. (Vol.IX, pp.22-25) However, he did not testify as to exactly what he compared. We do not know what about the impressions on the ground were common to the patterns on the shoes, which shoe matched which impressions, or anything else that could lead a jury to believe that his opinion was rationally linked to his perceptions.

Consequently, this Court cannot affirm the district court’s decision to overrule Mr. Vallejos’s objections to Officer Trujillo’s testimony on the ground that it was properly admitted as a lay opinion under CRE 701.

II. Trial courts can admit evidence of a defendant's uncharged acts only after completing the analyses prescribed in *People v. Garner* and *People v. Spoto*. Here, the district court admitted evidence of Mr. Vallejos's prior acts without conducting either the *Garner* or the *Spoto* analysis. The trial court thus erred by admitting the evidence.

#### A. Standard of Review

This issue was preserved for appellate review by contemporaneous objection. (Vol.VIII, pp.129, 140, 141) Additionally, Mr. Vallejos filed before trial a "Notice of Objection to Admission of Any Crimes Wrongs or Acts." (Vol.I, p.16)

Trial courts have substantial discretion when deciding whether to admit evidence of other acts. *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009). However, a trial court necessarily abuses its discretion when it misconstrues or misapplies the law. *People v. Robinson*, 187 P.3d 1166, 1177 (Colo. App. 2008). Additionally, a trial court's failure to exercise its discretion is itself an abuse of discretion. *People v. Darlington*, 105 P.3d 230, 232 (Colo. 2005).

Appellate courts review an erroneous admission of CRE 404(b) evidence for harmless error. *Yusem*, 210 P.3d at 469. Generally reversal is required unless the reviewing court can say with fair assurance that the error did not substantially influence the verdict or affect the fairness of the trial. *Id.* However, if an error rises to the level of implicating federal constitutional rights, reversal is required unless the

reviewing court can declare the error harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24.

## B. Applicable Law

Evidence of prior criminality casts “damning innuendo likely to beget prejudice in the minds of juries.” *People v. Lucero*, 200 Colo. 335, 343, 615 P.2d 660, 665 (1980) (citations omitted). Hence, the general rule is that evidence that tends to show that the accused has committed a crime wholly independent of the offense for which he is on trial is not admissible. *Ruark v. People*, 158 Colo. 287, 291-92, 406 P.2d 91, 93 (1965).

CRE 404(b) governs the admissibility of uncharged conduct. *People v. Novitskiy*, 81 P.3d 1070, 1071 (Colo. App. 2003). “Unless admitted pursuant to CRE 404(b), evidence of other bad acts unfairly exposes a defendant to the risk of being found guilty based on the defendant’s bad character rather than on evidence relating to the charged offense.” *Rincon*, 140 P.3d at 979.

Trial courts admitting other act evidence under CRE 404(b) must conduct the analyses prescribed by the Colorado Supreme Court in *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991), and *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). Initially, under *Garner*, trial courts must conclude by a preponderance of the evidence that the

uncharged conduct occurred and that the defendant was the perpetrator. 806 P.2d at 373.

Then, trial courts must conduct a four-part analysis pertaining to the “technical and policy concerns inherent in the other-crime evidence.” *Id.* To do so, courts first ask whether the proffered evidence relates to a material fact. *Spoto*, 795 P.2d at 1318. Second, they determine whether the evidence is logically relevant, i.e., does it have “any tendency to make the existence of [the material fact] more probable or less probable than it would be without the evidence?” CRE 401; *Spoto*, 795 P.2d at 1318. Third, courts determine whether the proffered evidence is relevant independent of the inference that the defendant has a bad character and acted in conformity with that bad character. CRE 404(b); *Spoto*, 795 P.2d at 1318. Finally, courts must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice. CRE 403; *Spoto*, 795 P.2d at 1318.

Failure to conduct the *Garner* and *Spoto* analysis of CRE 404(b) evidence is reversible error when the record does not support the trial court’s admission of the evidence. *Novitskiy*, 81 P.3d at 1072.

### C. Application

The district court improperly admitted testimony from two witnesses suggesting that Mr. Vallejos visited Nick’s Landscaping prior to the charged offenses.

First, the State asked an employee of the nearby palate recycling company if she had seen Mr. Vallejos's truck enter the property on other occasions before the charged burglary. (Vol.VIII, p.129) Defense counsel objected. The court found that the witness was providing information, "based upon something [she] had previously said." (Vol.VIII, p.129) However, the witness's prior testimony indicated only that on the day of Mr. Vallejos's arrest: "we'd been watching because we'd seen a maroon truck come out of Nick's Landscaping with wire racks in the back of the truck." (Vol.VIII, p.126) That testimony was unclear as to whether she was referring to the same day Mr. Vallejos was arrested, or another time. Only after defense counsel's objection did the witness say: "I know that we've seen the maroon truck a couple other times." (Vol.VIII, p.129-30) This later statement clarified that she intended to refer to prior uncharged, and by inference criminal, acts.

The district court did not determine by a preponderance of the evidence that it was indeed Mr. Vallejos whom the witness had seen, *see Garner*, 806 P.2d at 373, nor did it evaluate the relevance and propriety of this testimony or the prejudice that it could cause, *see Spoto*, 795 P.2d at 1318.

Second, the State asked another palate recycling company employee if he had seen the same truck on the property prior to the charged offense. (Vol.VIII, p.140-41) Defense counsel objected but was overruled, and the witness testified that he had

seen the truck “two or three times.” (Vol.VIII, pp.140-41) Again, the district court made no determination that such alleged prior transactions actually occurred, or that they were perpetrated by Mr. Vallejos. *See Garner*, 806 P.2d at 373. Nor did the court perform the requisite relevancy and propriety analysis. *See Spoto*, 795 P.2d at 1318. Rather, the court once again allowed the State to introduce prejudicial evidence of uncharged criminal acts to prove the charges against Mr. Vallejos, without conducting either the *Spoto* or the *Garner* analysis.

The record does not support admission of these statements. *Cf. Novitskiy*, 81 P.3d at 1072. The two recycling plant employees testified only that they saw a truck like Mr. Vallejos’s at Nick’s Landscaping before the charged offense. Thus, this Court cannot determine by a preponderance of the evidence that Mr. Vallejos was actually there or that the shed was previously burglarized. *See Garner*, 806 P.2d at 373.

Additionally, this Court cannot find that Mr. Vallejos’s alleged acts were admissible under the four-part *Spoto* analysis. The first prong of the analysis requires that proffered evidence relate to a material fact. *Spoto*, 795 P.2d at 1318. A material fact is either: (1) an actual element of the charged offense, or (2) an intermediate fact probative of an actual element. *Yusem*, 210 P.3d at 464. Here, because Mr. Vallejos maintained that he had permission to take the metal racks, he admitted to most of the elements of burglary and theft (the underlying crime). The only elements in question

at trial were whether Mr. Vallejos was authorized to enter the property and take the racks. *See* §§ 18-4-203, 18-4-401, C.R.S. 2009. Evidence suggesting he was on the property prior to March 13 does not relate to whether he had permission to take the racks on March 14.

Even if this Court finds that Mr. Vallejos's alleged other acts meet the first prong of the *Spoto* analysis — and that they are logically relevant under the second prong — they are not logically relevant independent of the inference prohibited by CRE 404(b). Evidence of prior acts is inadmissible unless it is logically relevant “independent of the intermediate inference . . . that the defendant has a bad character, which would then be employed to suggest the probability that the defendant committed the crime charged because of the likelihood that he acted in conformity with his bad character.” *Spoto*, 795 P.2d at 1318. Mr. Vallejos's alleged prior visits to Nick's Landscaping are only relevant to whether he was authorized to be there on March 14 because they suggest that he is the type of person who steals things. The jury could then infer that on the date of the charged offense he was acting in conformity with that character trait. However, that is precisely the inference prohibited by CRE 404(b).

Testimony regarding Mr. Vallejos's uncharged actions also cannot survive the fourth prong of the *Spoto* analysis, which requires courts to determine whether the

probative value of evidence is outweighed by the danger of unfair prejudice. 795 P.2d at 1318. Because alleged prior visits to Nick's Landscaping were not relevant to any material fact, they had zero probative value. However, as discussed below, the prejudice to Mr. Vallejos was substantial.

The district court allowed the State to encourage jurors to decide this case on the basis of Mr. Vallejos's character, rather than on his actions. In doing so the court cast aside basic concerns of the criminal justice system: that juries not convict defendants as a means of punishing them for their past deeds or undesirable character, and that defendants not be called upon to disprove prior acts or defend their personalities. *See Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009).

Consequently, the district court's admission of this evidence was reversible error. *See Novitskiy*, 81 P.3d at 1072. That error rose to the level of implicating Mr. Vallejos's right to a trial by an impartial jury. *See* U.S. Const. amends. VI, XIV.

#### D. Harm

The district court's error in improperly admitting 404(b) evidence was not harmless. The testimony in question consisted of vague and speculative statements that a truck like Mr. Vallejos's was seen on the property on several unknown occasions prior to the charged offense. The jury could have viewed the alleged prior visits as successful burglaries that were inconsistent with and completely undermined

Mr. Vallejos's assertion that he received permission to take the racks on March 13. Thus, the suggestion that Mr. Vallejos visited Nick's Landscaping prior to the date of the charged offense could have caused the jury to disregard his defense of permission.

Improperly admitted character evidence is profoundly prejudicial in cases that turn on credibility. This case was about nothing more than Mr. Vallejos's credibility. Evidence suggesting prior criminal acts may have tipped jurors' minds away from believing Mr. Vallejos's steadfast claims that had permission to take the metal racks in his truck. *Cf. Novitskiy*, 81 P.3d at 1072 ("the suggestion that defendant may have avoided prosecution for a prior similar crime could have caused the jury to disregard his defense of misidentification"). Under these circumstances, this Court cannot determine that the error was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24. Nor can it say with a fair assurance that the error did not substantially influence the jury's verdict. *See People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989) ("The proper inquiry in determining a harmless error question is not whether there was sufficient evidence to support the verdict without the improperly admitted evidence, but, rather, whether the error substantially influenced the verdict or affected the fairness of the trial proceedings.").

Consequently, reversal is required.

III. Prosecutors may not misstate the law in closing argument. Here, the prosecutor stated in closing that whether Mr. Vallejos acted “knowingly” required determining whether he was “out of his mind” or “sleepwalking.” The trial court erred in overruling an objection to this statement.

A. Standard of Review

Defense counsel preserved this issue for appellate review by contemporaneous objection. (Vol.IX, p.54)

The scope of closing argument rests in the sound discretion of the trial court and an appellate court will not disturb its rulings thereon absent a gross abuse of discretion resulting in prejudice and a denial of justice. *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984). Appellate courts generally review an abuse of discretion for harmless error, and must reverse unless there is no reasonable probability that the error contributed to the defendant’s conviction. *See Crider v. People*, 186 P.3d 39, 42 (Colo. 2008).

However, a prosecutor’s improper remarks in closing argument may implicate a defendant’s constitutional right to an impartial jury. *See* U.S. Const. amend. VI, XIV; *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). A jury that has been misled by improper argument cannot be considered impartial. *Domingo-Gomez*, 125 P.3d at 1048. An appellate court must reverse an error of constitutional dimension unless it is convinced beyond a reasonable doubt of the error’s lack of prejudice. *Crider*, 186 P.3d at 42.

## B. Applicable Law

In order to obtain a conviction for second degree burglary, the State must prove beyond a reasonable doubt that the defendant acted knowingly. § 18-4-203(1), C.R.S. 2009. “Knowingly” is statutorily defined:

A person acts “knowingly” . . . with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts “knowingly” . . . with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

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§ 18-1-501(6), C.R.S. 2009.

Prosecutors may not misstate or misinterpret the law during closing argument. *People v. Cevallos-Acosta*, 140 P.3d 116, 122 (Colo. App. 2005). A prosecutor’s improper remarks during closing argument may impinge upon a defendant’s right to a fair and impartial jury. *See Domingo-Gomez*, 125 P.3d at 1048.

## C. Application & Harm

Here, the State misstated the definition of “knowingly” during closing argument. Specifically, the prosecutor said: “Then we go to knowingly, meaning was Mr. Vallejos out of his mind? Was he sleepwalking? Was he - - did he know what he was doing? Of course he knew what he was doing.” (Vol.IX, p.54) Defense counsel objected and was overruled. (Vol.IX, p.54)

The prosecutor's statement may have given the jury the impression that in order to satisfy the mens rea requirement of second degree burglary, it need only find that Mr. Vallejos was more aware of his conduct than he would have been had he been sleepwalking or "out of his mind." The statutory definition of "knowingly," however, requires proof of awareness of the nature of one's conduct or its likely results. See § 18-1-501(6). Thus, the jury may have found Mr. Vallejos guilty based on a lesser mens rea standard than is required by the burglary statute.

If the jury applied an incorrect mens rea, and conviction resulted, Mr. Vallejos was both prejudiced and denied justice. See *Longinotti v. People*, 46 Colo. 173, 174, 102 P. 165, 166 (1909) (district attorney's mischaracterization of the elements of first degree murder required reversal of judgment); *State v. Jones*, 615 S.W.2d 416, 418, 420 (Mo. 1981) (prosecutor's misstatement of reasonable doubt standard required reversal). Therefore, the error was not harmless and reversal is required.

### **CONCLUSION**

Based on the foregoing arguments and authorities, Mr. Vallejos respectfully requests that this Court vacate the district court's judgment of conviction for second degree burglary.

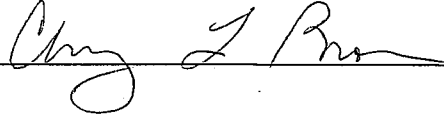
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CERTIFICATE OF SERVICE

I certify that, on November 3, 2009, a copy of this Opening Brief of Defendant-Appellant was served on Catherine P. Adkisson of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us.

A handwritten signature in cursive script, appearing to read "Cheryl L. Brown", is written over a horizontal line.