COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Arapahoe County District Court Honorable John Leopold Judge Case No. 99CR2428	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. ANTHONY SHAPIRO, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No.: 01CA19
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PEOPLE'S ANSWER BRIEF

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the trial court properly admitted the victim's statements under the residual hearsay exception.

II. Whether the two defense witnesses who indicated that they would assert their Fifth Amendment privilege if called to testify, voluntarily did so on the recommendation of their own attorney, who reviewed discovery, spoke with defense counsel, and advised them not to testify.

III. Whether the trial court properly allowed the prosecution to refer to Brenda Gregg's guilty plea as Accessory to First Degree Murder, since this is exactly the crime to which she pled, and because the trial court made it abundantly clear that her plea could not be used as substantive evidence of the defendant's guilt.

IV. Whether the trial court properly admitted evidence of the defendant's previous unprovoked, violent stabbing of an unarmed man for the limited purposes of proving modus operandi, motive, intent, plan and preparation pursuant to CRE 404(b).

V. Whether the trial court properly admitted a photograph of the victim with his children, as well as Exhibit 31, an autopsy photo objected to by the defense on the grounds that it was cumulative in nature, not because it was "extremely graphic."

VI. Whether the trial court properly refused to dismiss a juror who appeared distressed from seeing Exhibit 31, after the court carefully confirmed that his reaction would not affect his ability to render a fair and impartial verdict.

VII. Whether the trial court properly instructed the jury on the affirmative defense of self-defense, particularly since the defendant did not object to the instruction, and in fact requested the exact language about which he now protests.

VIII. Whether cumulative error occurred in this case.

STATEMENT OF THE CASE

On September 16, 1999, the defendant was charged in Arapahoe County District Court with Murder in the First Degree – After Deliberation, § 18-3-102(1)(a), C.R.S. (F-1) (2002), C.R.S. (v. 1, p. 40). The charges stemmed from the defendant stabbing the victim 33 times and killing him on the night of September 8, 1999. After a two-week trial, the jury found defendant guilty as charged and the court sentenced him to life without the possibility of parole (v. II, p. 443; v. 23, 11/17/00, p. 6). This appeal followed.

STATEMENT OF THE FACTS

In the early morning hours of September 9, 1999, Patrick Tretter's mutilated body was found lying in a pool of blood on the bike path that follows the Highline Canal near Hinkley High School in Aurora (v. 2-C, pp. 81-87). The defendant admitted to killing the victim, but claimed it was in self-defense or defense of others.

Patrick Tretter was the ex-husband of Brenda Gregg and a childhood friend of the defendant's (v. 20, p. 184, 189-90). It was undisputed at trial that the relationship between the defendant, Tretter and Gregg had deteriorated greatly by the time the defendant murdered the victim. Tretter and Ms. Gregg met in early 1990 and had twins in September of 1991 (v. 20, pp. 171-72). They remained together until late 1997, when Ms. Gregg moved out (v. 20, p. 173). At that point she had already begun a relationship with the defendant (Id.).

Throughout 1998 and 1999, the victim threatened Ms. Gregg by damaging her personal property and verbally harassing her (v. 20, p. 175). He also verbally threatened the defendant's mother, and Ms. Gregg's mother, either by speaking with them by phone or leaving messages. From the time that Ms. Gregg left him in 1997, however, the victim had never once acted on his threats of violence to her, the children, her mother, or anyone else[1] (v. 20, p. 180; v. 22, p. 107).

On the day of the murder, Ms. Gregg and the defendant went to work as scheduled (v. 20, p. 196). Ms. Gregg spoke with the victim that morning from work; he was "crying [and] kind of apologetic about some messages he had left," but made no threats toward her (Id.). Ms. Gregg left work and she and the defendant went to the dentist and then to their regular bowling league (v. 20, pp. 197-99). Ms. Gregg did not tell the defendant about her conversation with the victim that morning, because she tried to avoid discussing Patrick Tretter with the defendant as much as possible (v. 20, pp. 199-200).

The victim called Ms. Gregg's house several times while she and the defendant were bowling (v. 16, pp. 69-74).[2] He eventually told the sitter he was coming over to see the kids, but he later called back and said he would not come over (v. 16, pp. 76, 77). The sitter called Brenda Gregg at the bowling alley and told her about the victim's call, which she then relayed to the defendant (v. 20, pp. 200-201). Ms. Gregg decided she needed to leave to make sure the kids were okay, and the defendant indicated he wanted to leave with her, because "this was his

[1] The victim did punch Ms. Gregg in the face and pulled her hair before she left him in 1997. She indicated he became more volatile when he drank, and that was part of the reason she left him (v. 21, pp. 196, 199)

[2] The sitter, Amber Tucker, indicated the victim never sounded angry that evening, but rather that he seemed sad and was crying (v. 16, p. 93).

chance" (v. 20, p. 201). When they left, the defendant and Ms. Gregg seemed extremely upset and angry (v. 16, pp. 48, 82). One bowler heard the defendant say, "he was going to cut [the victim's] fucking throat out," that he was tired of "it," tired of "him," and did not want "it" to go on any longer (v. 16, p. 49).

The sitter called Ms. Gregg back and told her that Patrick Tretter had called again to tell her he was not coming over (v. 16, p. 77). However, Ms. Gregg and the defendant weren't sure whether he would or not, so they decided to wait for him at the bus stop, half a block from their home (v. 20, pp. 202-04, 206).

They waited there anywhere from 30 minutes to an hour. During that time they discussed the "constant harassment from Pat," and the defendant indicated he "wanted to get it over with" because "[h]e was tired of it" (v. 20, p. 204). The defendant then had Ms. Gregg call the victim to arrange a meeting (v. 20, p. 205). Although initially reluctant to meet with her, the victim finally agreed to do so (v. 20, p. 208). The defendant and Ms. Gregg then hatched their plan to "get[] rid of Pat" (Id.).

At the defendant's direction, Ms. Gregg drove him to Papa John's Pizza, his place of employment, to get a large chopping knife (v. 21, p. 21). He entered the restaurant, went directly to the back, took the knife, and left (v. 16, pp. 164-66; v. 21, pp. 25, 26). He and Ms. Gregg then began looking for a "dark location where there wouldn't be anybody around" to take the victim (v. 21, p. 28). Eventually, they settled on a dark, secluded area by Hinkley High School, near a bridge that crossed the Highline Canal (v. 21, pp. 29-30). Ms. Gregg left the defendant there and drove to pick up the victim. (v. 21, pp. 30-31). She indicated she did not

know where the defendant would be when she returned with the victim, but did know he would be hiding (v. 21, p. 31).

The victim entered Ms. Gregg's car with a bag of toys for the children, completely unaware of what Ms. Gregg and the defendant had in store for him (v. 21, p. 33). He was not at all aggressive or angry with Ms. Gregg, but rather seemed "sad" (v. 21, p. 34). They got out of the car at Ms. Gregg's suggestion and began walking toward the bridge (v. 21, p. 35). The victim had no idea the defendant was lying in wait for him (v. 21, p. 36).

They stopped on the bridge for "only a second or so," before the defendant ran out from the ditch area under the bridge, completely naked, and headed toward the victim. The victim barely had time to ask what was going on before the defendant began stabbing him (v. 21, pp. 36-39). While doing so the defendant told the victim he'd been "waiting a long time to do this" (v. 21, p. 42).

Ms. Gregg ran back to her car and waited for the defendant for what seemed to be an extended period of time. She got out of the car to see what was taking such a long time and saw the defendant standing over the victim, still stabbing him (v. 21, pp. 43-44). Eventually, the defendant returned to the ditch area where he re-dressed and then ran back to the car (v. 21, p. 45). The defendant spent the rest of the evening trying to clean up and dispose of the evidence, and attempting to acquire an alibi for his whereabouts that evening (v. 21, pp. 47-66; 70-78). He was arrested the next day.

SUMMARY OF THE ARGUMENT

I. The trial court properly admitted the victim's statements under the residual hearsay exception.

II. The two defense witnesses who indicated that they would assert their Fifth Amendment privilege if called to testify, voluntarily did so on the recommendation of their own attorney, who reviewed discovery, spoke with defense counsel, and advised them not to testify.

III. The trial court properly allowed the prosecution to refer to Brenda Gregg's guilty plea as Accessory to First Degree Murder, since this is exactly the crime to which she pled, and because the trial court made it abundantly clear that her plea could not be used as substantive evidence of the defendant's guilt.

IV. The trial court properly admitted evidence of the defendant's previous unprovoked, violent stabbing of an unarmed man for the limited purposes of proving modus operandi, motive, intent, plan and preparation pursuant to CRE 404(b).

V. The trial court properly admitted a photograph of the victim with his children, as well as Exhibit 31, an autopsy photo, which was objected to by the defense on the grounds that it was cumulative in nature, not because it was "extremely graphic."

VI. The trial court properly refused to dismiss a juror who appeared distressed from seeing Exhibit 31, after the court carefully confirmed that his reaction would not affect his ability to render a fair and impartial verdict.

VII. The trial court properly instructed the jury on the affirmative defense of self-defense, particularly since the defendant did not object to the instruction, and in fact requested the exact language about which he now protests.

VIII. There was no cumulative error in this case.

ARGUMENT

I. The trial court properly admitted the victim's statements under the residual hearsay exception.

The defendant first contends that the admission of hearsay statements made by the victim violated his right to confront witnesses against him.

A. The victim's May 1999 statement to police

The first statements about which the defendant complains are the victim's written statements to a police officer describing a confrontation he had with the defendant.

Four months before the murder, the defendant and Mr. Tretter were involved in an altercation in front of the movie theatre where the victim worked. Well in advance of trial, the prosecution requested that the court admit the victim's written statements he gave to the police under the residual hearsay exception, as to his version of the event (v. 13, pp. 29-30). The prosecution felt this information would be "illuminating for the jury[,] particularly in light of the court's ruling that his numerous other taped conversations at the defense request, which were as one-sided as th[e victim's] written statement, are being admitted for purposes of showing uncommunicated threats" (v. 13, p. 30).

In his statement, Patrick Tretter wrote:

> Wife came to pick up my children from work. She showed up with her boyfriend. I have known this guy for 15 years. I had some words with him about the concern of my children. He started to cuss me out. **He started towards me and I pushed him away**. Then he cold-cocked me. He just kept saying bad words. I've told my wife not to bring him around me. He has threatened me more times. I do not respect him at all for doing this when my kids are with me. In my own words, signed Patrick Tretter.[3]

(v. 20, pp. 165-66) (emphasis added).

The admissibility of the victim's statements was litigated before trial, but the court deferred ruling until it heard from the other witnesses who were present during the fight (v. 13, p. 34-35). At trial, before calling the officer, the prosecution called Alex Valdez, who testified that he saw the defendant and the victim "squaring up" as if they were about to fight (v. 20, p. 140).

[3] The victim also told Officer Abbott in his written statement that "he has told me (in the past) that he would shank me" (v. 20, p. 88). However, the court did not allow in this portion of the defendant's statement, finding that "it almost suggests that the defendant has threatened to shank him when the kids are around, [and] there's no indication that there was a weapon at the time of the movie theater incident" (v. 20, pp. 88-89).

He then indicated he saw the victim get punched in the face (v. 20, pp. 140-41). Brenda Gregg later testified that she also witnessed the incident, and confirmed that the victim first pushed the defendant before the defendant punched him in the mouth (v. 20, pp. 186-89).

People v. Fuller, 788 P.2d 741, 744 (Colo. 1990), outlines the five prerequisites to admission of statements under the residual hearsay exception: 1) the statement is supported by circumstantial guarantees of trustworthiness; 2) it is offered as evidence of material facts; 3) the statement is more probative on the points for which it is offered than any other evidence which could be reasonably procured; 4) the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and 5) the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence. See also People v. Jensen, 55 P.3d 135, 139 (Colo. App. 2001).

Using this framework, the court deemed the victim's statements admissible (minus the reference to "shanking" the victim) under the residual hearsay exception, CRE 807 (v. 20, pp. 88-91). The court also allowed Officer Abbott to testify that Patrick Tretter called him approximately one week after the incident and asked him not to issue a summons (v. 20, p. 166). The court specifically found that:

> [t]here's been plenty of discovery on this. Everyone has known about this for some time. It is offered as to evidence of a material fact; that is, the intent of the defendant. The statement is more probative as redacted on the point for which it is offered that other evidence which can be procured and the general purposes of the rules are satisfied with the redacting for allowing it to come in.

(v. 20, pp. 90-91).

Defendant complains on appeal that the trial court "completely overlooked the constitutional and evidentiary requirement that residual hearsay possess particularized guarantees of trustworthiness" (Opening Brief at 9). However, the record here indicates that the victim's statements had sufficient indicia of reliability to satisfy constitutional concerns. See Jensen, supra.

Here, the victim volunteered these statements to an officer at the scene, right after the altercation occurred. His description of the incident, contrary to defendant's contention, was not self-serving. He admitted up front that he was the initial aggressor by pushing the defendant. This was corroborated by the other two witnesses who testified about the fight. He stated that he was "cold-cocked," indicating he was the person who was punched (as opposed to the other way around), and this, too, was corroborated by the other two witnesses. Defendant takes great issue with the word choice of the victim, in that he described being "cold-cocked," but he was able to show, through cross-examination of the other witnesses, that the two appeared to be engaged in mutual combat before the punch was thrown. In the absence of evidence that the victim was falsely implicating the defendant, and because every reasonable inference pointed to the contrary, it is reasonable to conclude that the statement was supported by guarantees of trustworthiness.

The victim's statement also satisfied the other requirements of CRE 807. It was relevant to help explain the relationship between the victim and the defendant, and to put into context the dozens of statements made by the victim against the defendant and Ms. Gregg. There was no better evidence as to what occurred from beginning to end between the two; the other two witnesses indicated they did not see the whole fight.

The evidence also tended to establish a hostile relationship between the victim and the defendant. The statement was offered to establish the material fact that the defendant had a motive to kill the victim. Indeed, in a homicide trial, evidence of prior threats, mistreatment, or malice by the defendant toward the victim is admissible to show the defendant's motive and culpable mental state. People v. Gladney, 570 P.2d 231 (Colo. 1977).

Assuming, arguendo, this court determines all the factors mandated by CRE 807 and Fuller were not satisfied in this case, any error in the trial court's admission of the victim's statement is harmless beyond a reasonable doubt. Under the harmless error rule, an error in a criminal trial should be disregarded if there is no reasonable probability that the error contributed to the defendant's conviction. Fuller, 788 P.2d at 746 (citing Tevlin v. People, 715 P.2d 338, 342 (Colo. 1986)). "The proper inquiry in determining a harmless error question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings." People v. Carlson, 712 P.2d 1018, 1023 (Colo. 1986).

This "incident" was a diminutive portion of the substantial amount of evidence establishing the defendant's motive to murder the victim. The prosecution presented abundant evidence at trial that the defendant plotted the death of the victim and devised a plan to lure him away from safety, before ambushing him and hacking him to death. In addition, the impact of the victim's statement was undoubtedly lessened by testimony of witnesses who portrayed the event as one in which both parties were at fault. The impact was also most likely diffused by evidence of the dozens of threatening phone calls made by the victim to Ms. Gregg, in which the victim threatened to "tear [the defendant's] head off," "beat his ass," "fuck him," and "hunt

[him] for the rest of [the victim's] life" (Defendant's Exhibit D, pp. 1-8).[4] In light of this evidence, any alleged error was clearly harmless. See Fuller, supra.

B. The undated diary "entry"

The defendant also complains that the trial court erred when it allowed into evidence "the contents of Tretter's diary" under the residual hearsay exception (Opening Brief at 12).

When the victim was discovered, the police found cigarettes, his father's keys, and a small, black diary by his body (v. 2-C, p. 86). Prior to trial the prosecution sought to introduce the victim's statements in the diary, but the court ruled that the diary would not be admitted (v. 13, pp. 69-71). However, the court did rule that the prosecution could introduce evidence that the diary referenced the victim's "undying love for Gregg" (v. 13, pp. 69-71). In opening statement, without objection, the prosecutor alluded to the diary once, stating that the victim came "armed" to the scene of the murder "with his cigarettes, with his cigarette lighter, with a little notepad that just professed his love for Brenda . . ." (v. 2-C, 11/06/00, p. 59). During trial, the only evidence presented about the "diary" was through Detective Piel, who was asked whether it was "fair to characterize the contents of that notebook as personal references to Patrick Tretter's life, his children, and [Ms.] Gregg" (v. 18, p. 11). Again without objection, the detective responded "yes" (v. 18, p. 12).

Contrary to defendant's claim, the "contents" of the diary were not admitted at all. Accordingly, his argument that they were erroneously admitted under the residual hearsay

[4] This is an small example of the many vulgar, violent threats the victim made to the defendant, all of which were played for the jury.

exception should be disregarded. His contention that they were inadmissible for lack of foundation should likewise be ignored.

The relevance of the general nature of the contents of the diary is evidenced by the fact that the victim took very few items with him to the scene. Considering the fact that the defendant alleged self-defense here, it was crucial for the prosecution to be able to put on some evidence of the victim's state of mind when he left his home to meet with Ms. Gregg (and unwittingly, the defendant): namely, that he was thinking of his relationship with her and his children, and not of his anger toward the defendant. This evidence was relevant, was not prejudicial, and was not objected to by the defense. Any alleged error in its admission did not amount to plain error. See Wilson v. People, 743 P.2d 415 (Colo. 1987) (plain error occurs when the fundamental fairness of the trial is so undermined as to cast doubt on the reliability of conviction).

II. The two defense witnesses who indicated that they would assert their Fifth Amendment privilege if called to testify, voluntarily did so on the recommendation of their own attorney, who reviewed discovery, spoke with defense counsel, and advised them not to testify.

Defendant next contends that the prosecution's "unwarranted pretrial threats to prosecute defense witnesses" deprived the defendant of his right to present a defense in his case (Opening Brief at 13).

A defendant's right to compel the attendance of witnesses and to offer testimony at trial is a fundamental element of due process of law. However, the overlapping guarantees of the compulsory process clause and the due process right to call witnesses are not absolute. People v. Chastain, 733 P.2d 1206 (Colo. 1987).

The Sixth Amendment right of an accused to compulsory process to secure the attendance of a witness does not include the right to compel a witness to waive his or her Fifth Amendment privilege. United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir.1978). "When a defendant's rights under the Sixth Amendment collide with a witness's Fifth Amendment rights, the defendant's right to compulsory process must give way to the witness's privilege not to give self-incriminating testimony." People v. Coit, 50 P.3d 936, 938 (Colo. App. 2002).

Juanita and Stephen Vichory, the defendant's mother and brother, appeared in court on November 8, 2000, with an attorney named Mitch Geller. Mr. Geller informed the court that his clients had been subpoenaed by the prosecution for the previous Monday, at which point they were advised that the prosecution was considering filing charges against them for perjury or accessory after the fact (v. 17, p. 71). Mr. Geller informed the court that he would "like to be in a position to advise his clients of just how real the risk [would be] of the charges" that could be filed, and wanted the court to order the prosecution to allow him to review "whatever discovery the prosecution has that they feel they can base such charges on" (v. 17, p. 72).

The court ordered the prosecution to have the discovery available for Mr. Geller to review, and continued the witnesses' subpoenas to the following week (v. 17, p. 76). On November 14, 2000, the Vichorys again appeared with Mr. Geller, who indicated that he reviewed and copied "somewhere between two and three hundred pages [of discovery] that [he] felt related to his clients" (v. 21, p. 5). He then made the following record:

> **I believe that in discovery there is a potential basis for the prosecution to file charges against my clients, at least one of them, perhaps both of them**. I think it's exceedingly thin, quite frankly. I think they would have an exceedingly difficult time trying to prove a case, but **I've advised my clients that the safest**

> **thing for them to do is to refuse to testify based on their Fifth Amendment privilege against self-incrimination** and I have explained to them what the necessity of fighting a case like that, whether the prosecution would be successful or not, might entail.
>
> **I've also discussed with the defense counsel this morning precisely what kind of testimony they wanted from my clients. I feel that that would open the door to cross-examination that could potentially engage them, so I have advised them not to testify**. I have asked them **whether they choose to testify based on that advice and they indicate that they do not choose to testify** and they're both here to confirm that this morning.

(v. 21, p. 5) (emphasis added).

At that point Mr. Portman, the lead defense attorney, indicated that there was "not much [he could] do" if they were invoking their right through counsel to Fifth Amendment protections. He further indicated that Detective Piel provided the defense with a note of the interview and the charges of which the Vichorys were advised. That was the extent of his record on the subject (v. 21, pp. 6-7).

Juanita and Stephen Vichory testified at a pre-trial hearing on July 25, 2000, regarding numerous alleged threats made to them by the victim (v. 9, pp. 48-68, 146, 152-65). The defendant draws attention to the fact that they testified "without incident" at that hearing, and that the prosecution "threatened charges only after it was clear the Vichorys' testimony would be favorable to the accused" (Opening Brief at 16).

This allegation leaves out several important pieces of information. First of all, the prosecution knew nothing more of the Vichorys' involvement in the case until after that July 25, 2000, motions hearing, when Brenda Gregg tendered her "proffer." According to the record, Ms. Gregg agreed to the terms of the proffer on July 31, 2000 (v. 2, pp. 334-35). She was

interviewed by the prosecution after that date, which was also after the motions hearing at which the Vichorys testified.

Second, the information concerning the Vichorys' contact with the defendant and Brenda Gregg came from Ms. Gregg as a result of this proffer. Neither witness testified at the earlier hearing about any contact with the defendant subsequent to the murder. But in fact, both Juanita and Stephen Vichory saw the defendant directly after he murdered the victim. He was covered in the victim's blood and wanted an alibi defense from his mother. It is unclear, however, what other information regarding the Vichorys' involvement in the crime was part of the discovery that Mr. Geller perused before recommending to his clients that they not testify. The defendant did not make those pages of discovery part of this record, and because he did not, this court must presume that the information provided to Mr. Geller supported his recommendation that his clients not testify.[5]

Moreover, it was not only this additional information that caused Mr. Geller to advise his clients to refuse to testify. He also based his advise on the defense attorney's own representation of the questions he would want to ask the Vichorys, that would potentially open the door on cross-examination to them making incriminating statements (v. 21, p. 5).

The defendant also claims that it is "significant" to a showing of bad faith on the part of the prosecution that to date, the prosecution has not brought charges against the Vichorys

[5] Appellants bear the burden of providing reviewing courts with a proper record with which it can address his or her appellate claims. People v. Velarde, 200 Colo. 374, 616 P.2d 104, 105 (1980); Till v. People, 196 Colo. 126, 581 P.2d 299, 300 (1978); C.A.R. 10(b) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.").

(Opening Brief at 16). This fact is of no consequence. The Vichorys did not testify, so they did not incriminate themselves. It was out of concern that what they might say while testifying could lead to charges, that their own attorney advised them not to do so. The fact that the prosecution did not end up charging them is of absolutely no importance to the determination of this issue.

Defendant also raises the issue of the "timing" of the People's threat to prosecute, because the charge had been pending for more than a year before the Vichorys were advised of the possibility. Again, this argument fails to take into account the fact that the prosecution did not know of the extent of the Vichorys' involvement in the case until well after the murder took place. In fact, it was almost 11 months after the murder that Ms. Gregg made her proffer. Moreover, the record does not substantiate the allegation that "there was nothing that prevented the prosecution from 'advising' the witnesses before the morning of trial" (Opening Brief at 17). In fact, it is highly likely that once Ms. Gregg's proffer came to light, the Vichorys refused any contact with the prosecution. In such an instance, the first chance the prosecution would have had to advise them would have been when they appeared on their subpoenas.

Defendant's reliance on United States v. Smith is misplaced. In that case, after trial had started, the prosecutor advised the only defense witness who could supply the defendant with self-defense evidence, that if he took the stand he might be prosecuted as a principal in the crime. Smith, 478 F.2d 976, 977 (D.C. Cir. 1973). Of critical importance in Smith was whether the victim was attacking the defendant with a razor when he was shot. The only witness who could corroborate the defendant's contention that the victim was armed was the very witness the U.S. Attorney threatened with prosecution. The appellate court found that the prosecutor's warning

was "plainly a threat that resulted in depriving the defendant" of this important witness's testimony. Id. at 979. The court also found that "if the prosecutor thought the witness should be advised of his rights then he should have suggested that the court explain them to [him]." Id.

Here, the Vichorys' testimony would not have been nearly as important as the defense portrays it to have been. The majority of it would have been cumulative information regarding the victim's volatile behavior and the numerous threatening phone calls he made. The defendant cannot make a plausible showing of how any evidence possibly presented by these witnesses would have been both material and favorable to his defense. People v. Bell, 809 P.2d 1026 (Colo. App. 1990).

Furthermore, the witnesses made it apparent they were basing their decision not to testify on their own attorney's advice, whose record was clear that they faced a real possibility of incriminating themselves on cross-examination if the defense attorney questioned them as he indicated he would. Under these circumstances, the defendant's right to compulsory process properly gave way to the witnesses' privilege not to give self-incriminating testimony.

III. The trial court properly allowed the prosecution to refer to Brenda Gregg's guilty plea as Accessory to First Degree Murder, since this is exactly the crime to which she pled, and because the trial court made it abundantly clear that her plea could not be used as substantive evidence of defendant's guilt.

Next, the defendant contends that the trial court reversibly erred when it allowed the prosecution to refer to Brenda Gregg's guilty plea as Accessory to First Degree Murder.

The guilty plea of an accomplice which is "considered as amounting to a voluntary confession of his guilt" is not admissible as substantive evidence of another person's guilt. Paine v. People, 106 Colo. 258, 103 P.2d 686, 689 (1940) (citing Cook v. People, 56 Colo. 477, 486,

138 P. 756, 759 (1914)). However, evidence of an accomplice's guilty plea may be admissible for other purposes. People v. Brunner, 797 P.2d 788, 789 (Colo. App. 1990). The evidence may be used to show acknowledgment by the accomplice of participation in the offense. Id. Evidence of an accomplice's guilty plea is also relevant to impeach the credibility of the accomplice and may be elicited by the prosecution to "blunt an expected attack on the credibility of the accomplice as a witness." Id.

Here, the defendant claims that by allowing the prosecution to refer to the crime to which Ms. Gregg pled as "Accessory to First Degree Murder," as opposed to "Accessory to a Crime," the court created an "unnecessary risk that the jury would improperly use [Ms.] Gregg's testimony as substantive evidence against the defendant (Opening Brief at 21). However, contrary to defendant's contention, the court made it abundantly clear that Ms. Gregg's guilty plea could not be used as substantive evidence of defendant's guilt. In part, the court stated:

> You must decide whether the defendant, continuing as he is to be presumed innocent, has . . . committed the crime of first degree murder **based only on the evidence presented here in the courtroom**. . . . The fact that [Ms. Gregg] pled guilty to [accessory] **does not mean that the State has proved the defendant is guilty of murder in the first degree**.

(v. 21, pp. 109-10) (emphasis added).

Clearly, the jury understood from the court's statements that it could not use Ms. Gregg's plea as evidence of the defendant's guilt. The defense certainly thought this information was adequate at the time it was given, because it neither objected, nor, when asked, indicated that it desired any further advisement (v. 21, p. 110).

The defendant also complains that in closing the prosecutor "improperly" argued that Ms. Gregg would not have pled guilty to accessory if the defendant had acted in self-defense, because if he had there would be no first degree murder (Opening Brief at 20). However, the defense takes the prosecutor's comments out of context. The comments about which defendant objects were made during rebuttal close, without objection by the defense. They were made solely in the context of commenting on the credibility of Brenda Gregg. In no way, in any of the comments about which the defendant now complains, did the prosecutor imply that because Ms. Gregg pled guilty to accessory, the defendant was therefore guilty of first degree murder. This court must look at the context of the prosecutor's statements as a whole, as opposed to the few lines the defense chose to highlight (v. 23, pp. 128-32).[6]

Moreover, there is nothing in the record that would support a finding of plain error. See People v. Kruse, 839 P.2d 1, 3 (Colo. 1992) (plain error occurs when, after review of entire record, error so undermined trial's fundamental fairness as to cast serious doubt on reliability of conviction). Indeed, even assuming that it was error for Ms. Gregg to testify concerning her

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[6] The prosecutor's argument on this subject began as follows:

> Let's talk about Brenda, who was treated in sort of a schizophrenic manner there. When she was saying helpful things, she was the victim of horrible abuse. And she was a victim of abuse from Patrick Tretter. When she was saying things that were not so convenient for the defense, she was lying. Why? Why was Brenda Gregg lying? Why make that up? They would like you to believe that she so feels the need to please the prosecution that she would plead to accessory to first degree murder when she doesn't have to because there's no crime here.

(v. 21, p. 128).

guilty plea, the evidence of defendant's guilt based on the record available was such that any error was, in fact, harmless. See People v. Craig, 179 Colo. 115, 498 P.2d 942, 944 (1972).

IV. The trial court properly admitted evidence of defendant's previous unprovoked, violent stabbing of an unarmed man for the limited purposes of proving modus operandi, motive, intent, plan and preparation pursuant to CRE 404(b).

The defendant next complains that he was denied his right to a fair trial when the trial court admitted evidence of a prior incident, which he asserts was irrelevant and highly prejudicial. However, the evidence was relevant to prove modus operandi, motive, plan and preparation, as well as to prove the material issues of the defendant's intent and his claims of self-defense. It therefore had significant probative value which was independent of his character, and which was not substantially outweighed by any danger of unfair prejudice.

District Court Proceedings

Prior to trial, the People filed a notice of intent, under CRE 404(b), to present evidence of two prior incidents for the limited purposes of showing the defendant's intent (i.e., that he did not act in self defense or in defense of others), as well as to demonstrate proof of motive, common plan or scheme, knowledge or identity (v. 1, pp. 122-38). The defense agreed that the 1999 incident was admissible, but objected to the admissibility of the 1991 assault. At a hearing on the motion, the People proceeded by offer of proof about the 1991 incident (v. 2, pp. 292-99; v. 11, 10/04/00, pp. 13-16, 28-37, 40-42). The trial court then granted the People's motion in part, allowing evidence of the 1991 assault to show the defendant's motive, modus operandi and identity (v. 11, 10/04/00, pp. 42-49). The court reserved ruling on the question of intent at that point; however, once the defendant raised the issue of self defense, the court ultimately ruled the

incident would be admissible to show modus operandi, motive, intent, plan and preparation (v. 20, pp. 101-02).

In its offer of proof the People presented evidence that

> [t]he defendant was living in the basement of Steve and Dawn Harker's home in Lakewood, Colorado. The victim of the stabbing, David Estill, was a friend of both the defendant and the Harkers. The defendant had discussed with the victim, David Estill, his desire to have an affair with Dawn Harker. On the evening of the assault, Dawn Harker's husband Steve was hospitalized. Dawn Harker invited the victim David Estill to her home. While they were sitting in the couch in the home, the defendant came out of the Harkers' bedroom and ordered the victim to leave. When the victim refused, the defendant instigated a fight. The defendant left the room and when he returned, he was armed with a kitchen knife and a meat cleaver. The defendant stabbed the victim in the left arm and the left hand.

(v. 1, p. 123).

Several months before the motions hearing the prosecution also submitted a "summary" of the incident that included further details about the 1991 assault: When the defendant entered the Harkers' living room, he was clothed only in his underwear and a bathrobe, and as he stabbed the victim he said, "I'm going to fucking kill you, get out of here" (v. 2, p. 295). Before the court made its final ruling the prosecution also stated that after the stabbing the defendant "had significant blood on him. . . . [T]he weapon actually broke and . . . the knife was lying in two pieces on the floor (v. 20, p. 92). The prosecution also argued in great detail why it believed evidence of the prior assault should be admitted (v. 11, 10/04/00. pp. 13-15, 30-37, 40-42; v. 20, pp. 92-96, 99-101).

In conducting the four-prong Spoto analysis, the trial court found that the evidence of the 1991 incident (1) related to a material fact, specifically: a) motive (two individuals competing for

the interests of one woman); b) modus operandi (defendant resolving his problems by resorting to using a knife and stabbing somebody; c) intent (because the defense of self-defense was raised); and (d) plan and preparation (v. 11, 10/04/00, pp. 48; v. 20, pp. 101-02); (2) was logically relevant because it bore directly upon both an element of the charge of first degree murder and upon the defenses raised by the defendant (i.e., that he acted in self-defense and used force only because he was threatened) (v. 20, pp. 101-02); (3) was relevant independent of the inference of bad character because it "isn't out there to simply establish bad character. It is designed in this case to lead to the question of a legitimate point that the State makes . . . ." (v. 11, 10/04/00, p. 47); and (4) that the probative value of the evidence, in assisting the jury to determine whether this was a self-defense situation, was not substantially outweighed by the danger of unfair prejudice (v. 11, 10/04/00, p. 47).

The Standard for Admissibility of Other Acts Evidence

Unless otherwise provided by constitution, statute or rule, all relevant evidence is admissible. CRE 402. Relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403. The thrust of Rule 403 favors admissibility. People v. District Court, 785 P.2d 141, 146 (Colo. 1990).

The admissibility of other acts evidence is governed by CRE 404(b), which provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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.

The Colorado Supreme Court has set forth the following four-part test for determining whether other-act evidence is admissible: (1) the proffered evidence must relate to a material fact in the case, i.e., a fact that is of consequence to the determination of the action; (2) it must be logically relevant to the material fact, i.e., it must have a tendency to make the existence of the material fact more probable or less probable than it would be without the evidence; (3) the logical relevance must be independent of the inference prohibited by CRE 404(b) that the defendant committed the crime charged because of his criminal propensities; and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. People v. Garner, 806 P.2d 366, 373 (Colo. 1991); People v. Spoto, 795 P.2d 1314, 1318 (Colo. 1990).

A trial court has substantial discretion in deciding the admissibility of other-act evidence, and a reviewing court must not overturn that ruling absent an abuse of discretion. Douglas v. People, 969 P.2d 1201, 1205-06 (Colo. 1998); People v. Gibbons, 905 P.2d 604, 607 (Colo. 1995). A reviewing court may only find such an abuse of discretion when the trial court's ruling was "manifestly arbitrary, unreasonable, or unfair." People v. Czemerynski, 786 P.2d 1100, 1108 (Colo. 1990). Furthermore, in reviewing the admission of other-acts evidence, an appellate court must "assume the maximum probative value a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected from its introduction." People v. Masters, 33 P.3d 1191, 1196 (Colo. App. 2001).

An application of this four-prong Spoto test demonstrates that evidence of the 1991 assault incident was properly admitted under CRE 404(b).

1. The evidence is related to a material fact

The defendant concedes that the contested testimony met this first Spoto requirement for admissibility (Opening Brief, p. 30). The evidence of the 1991 was relevant to the material issues of the defendant's intent, as it bore directly upon a specific element of the crime of first degree murder and also upon his claims of self-defense and defense of others.

Prior to trial, the defendant informed the prosecution that he intended to present the affirmative defense of self-defense. This affirmative defense clearly makes the defendant's intent a key issue in this case; the central question was whether his act of stabbing the victim to death was justified by a need to protect himself or his family. See Spoto, supra, at 1318 (the central issue is Spoto's intent, as it bears on the issues of premeditation, self-defense, and accident, and this is undeniably a material fact).

2. The evidence is logically relevant

The defendant also appears to concede that the other acts evidence also satisfies this second step of the Spoto analysis (Opening Brief at 31). Evidence is logically relevant when it has any tendency to make the existence of a material fact more probable or less probable than it would be without the evidence. Spoto, supra, at 1318; CRE 401. Here, the evidence of the 1991 assault is logically relevant to the material issue of intent. "At minimum, the incident suggests that [the defendant] is the type of person who would [stab] someone when it is not necessary for self-defense." Id. at 1319. Because the evidence shows that he previously instigated a stabbing when not in danger, it makes it more likely that his intent during the charged offense was to kill the victim after deliberation, and less likely that his intent was to protect himself (or someone else).

3. The evidence is independent from any impermissible inference

The defendant claims that the other acts evidence only shows his propensity for unnecessarily using knives against people, and, therefore, was admitted for the improper purpose of showing that he acted in conformity with his bad character. However, the evidence of the 1991 assault had probative value which was independent of the issue of character - the evidence shed light on a disputed issue, the defendant's intent in stabbing the victim, and called into question his claims of self-defense.[7]

Colorado courts have previously determined that other acts evidence which shows a defendant's criminal intent, or which refutes a defendant's defense or alibi, may be properly admitted pursuant to CRE 404(b). The defendant has failed to mention or acknowledge two such decisions by the supreme court which are directly on point, People v. Willner, 879 P.2d 19 (Colo. 1994), and Douglas v. People, supra.

In Willner, the defendant was charged with first degree murder in the shooting death of a man who was attempting to repossess his car; Willner claimed that he shot the victim in self-defense. Willner, 879 P.2d. at 21. The trial court admitted evidence of two prior similar incidents - one in which Willner had previously fired several shots to prevent another repossession, and one in which Willner, while working at a Christmas tree lot, fired six times at a person in a van who was stealing a Christmas tree - for the purposes of showing Willner's deliberation, intent and state of mind. Id. at 25-26.

[7] "Similar transaction evidence, almost by definition, focuses attention on a defendant's bad character. Due to this fact, the third Spoto prong does not require the absence of an inference based on propensity. Instead, the rule only requires that the proffered evidence be logically relevant independent of that inference." People v. Duncan, 33 P.3d 1180 (Colo. App. 2001).

The supreme court determined that "Willner's intent was a material issue in th[e] case, given that it bore on the issues of self-defense and premeditation," that the similar transactions were "logically relevant, in that they make it more probable that Willner acted with criminal intent in shooting the victim," and that this logical relevance was "independent of the inference that they demonstrate that [Willner] has a bad character." Id. at 26-27. Therefore, the court held that "the trial court's decision to admit the evidence satisfie[d] all four prongs of the Spoto analysis." Id. at 27.

In Douglas, the defendant was charged with two counts of felony menacing when he pointed a loaded gun at both victims' heads; Douglas asserted he acted in self-defense. 969 P.2d 1201, 1202. The trial court admitted evidence of two prior similar incidents - one in which Douglas became enraged and pointed a gun at a former girlfriend's head and asked her if she was afraid to die, and one in which he terrorized his neighbor by pointing a gun at her chest while shouting "I'm going to kill all of you" - for the purpose of rebutting Douglas's claim of self-defense. Id. at 1204.

The supreme court found that the evidence of the other acts was probative of the disputed issue of Douglas' mens rea regarding his self-defense claims, and that it was admissible to rebut his self-defense claims because that evidence "had independent relevance by demonstrating that [he] previously threatened others by use of a gun without provocation and in the absence of any danger to himself." Id. at 1206.

Just as in Willner and Douglas, here, the other-acts evidence was material and probative, separate from the issue of the defendant's character, because it constituted circumstantial evidence of the defendant's criminal intent. The question of the defendant's intent was central to

this trial, and the trial court correctly determined that this evidence bore directly on that question, independent of the inference that the defendant has a bad character. See also People v. Gutierrez, 622 P.2d 547, 552 (Colo. 1981) (other-acts evidence properly admitted to refute, counteract, or disprove the defendant's alibi evidence); People v. Marquantte, 923 P.2d 180, 184 (Colo. App. 1995) (defendant's other acts of violence properly admitted to show his state of mind and that he acted intentionally).

Defendant complains that the prosecution failed to articulate a theory of logical relevance independent of the inference barred under CRE 404(b) (Opening Brief at 27, 31). However, a review of the record demonstrates he is mistaken. Here, the jury had to decide whether the defendant had the requisite intent of self-defense to justify or excuse his actions. That is "did [he] use the [knife] in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by his victim[], and whether [he] used force reasonably necessary for that purpose," or did he act only after deliberation with intent to kill the victim? Douglas, 969 P.2d at 1207.

Specifically, in the previous incident, the defendant attacked an unarmed man with a knife, without provocation, while wearing a white bathrobe, which became drenched in blood after the stabbing. The evidence at trial showed that the defendant completely disrobed before attacking Mr. Tretter. The previous incident went directly to the issue of whether the defendant disrobed in order to "surprise" the victim, or whether he disrobed to avoid getting the evidence on his clothes. This evidence was directly relevant to showing that the defendant planned his crime ahead of time, which also went to rebut his claim of self-defense.

Also in the previous incident the knife broke when the defendant stabbed the victim in the hand (v. 22, p. 158). The motive and intent of the defendant on the night of the murder, then, are clearly brought into question by the fact that the defendant commented to Ms. Gregg that this time the "knife didn't break," and by the fact that he told her that he wanted to get a gun instead of a knife (v. 21, p. 52; v. 20, p. 100). This prior act provided relevant evidence completely independent of the inference of bad character.

4. The probative value is not outweighed by unfair prejudice

All evidence that strengthens the prosecution's case is prejudicial, in the sense of being damaging or detrimental to the defendant. However, unfair prejudice refers only to evidence which tends to cause a decision to be made on an improper basis. People v. Garner, 806 P.2d 366, 375 (Colo. 1991); People v. McKibben, 862 P.2d 991, 994 (Colo. App. 1994). Here, the question is whether evidence of the prior act so disadvantaged the defendant as to be unfairly prejudicial, and if so, whether the prejudicial effect substantially outweighs the probative value of the evidence.

The defendant compares this case to the situation in Spoto; however, the two cases are different. In Spoto, the defendant was charged with first degree murder in the shooting death of Roger Berg. Spoto claimed that he and Berg had struggled and his gun had accidentally gone off. Id. at 1319. In order to rebut Spoto's evidence of self-defense and accident, the prosecution introduced evidence of a prior occasion during which Spoto woke up his roommate by putting a gun to his head. Id. at 1316-17. The supreme court found that the trial court erred in admitting the other act evidence because: 1) the prior incident was not logically relevant, independent of its relevance for the forbidden purpose of showing bad character, due to the lack of probative value

and similarity between the two incidents; and 2) even if the prior incident could be considered admissible for some narrow purpose, the limited probative value was substantially outweighed by the danger of unfair prejudice, based upon the inadequate instructions by the trial court and the prosecutor's focus on the prior incident in his closing argument. Id. at 1320-21.

Here, the prior assault evidence had significant probative value as it tended to prove an element of the offense and disprove the defendant's defenses. The evidence rendered the defendant's version of events less believable. Unlike Spoto, where the defendant shot a man in the charged offense and merely threatened a man during the prior incident, here, both incidents were similar in that they involved unprovoked, repeated stabbings with a knife. The similarity between the two incidents makes this case more like Willner and Douglas than Spoto.

Moreover, the potential for prejudice was not overwhelming in this case. In Spoto, the defendant told a "seemingly plausible story." Id. at 1320. Here, the defendant's claims of self-defense were not at all supported by the evidence. Also in Spoto, the supreme court found that "the trial court did not reduce the probability by carefully instructing the jury." Id. at 1321. Here, the trial court's limiting instructions were proper and overly-cautious, and thus eliminated any danger that the jury might misuse the evidence (v. 22, pp. 149-50, 173; v. 2, p. 396). The court properly determined that any unfair prejudicial effect from the other acts evidence did not substantially outweigh the significant probative value it had for the purposes permitted by CRE 404(b).

V. The trial court properly admitted a photograph of the victim with his children, as well as Exhibit 31, an autopsy photo, which was objected to by the defense on the grounds that it was cumulative in nature, not because it was "extremely graphic."

Next, the defendant contends the trial court abused its discretion by admitting 1) a "misleading" photograph of the victim with his children, and 2) an autopsy photograph.

1. The photograph of the Patrick Tretter and his children

Prior to trial, the defense objected to the admission of a photograph of Brenda Gregg, Patrick Tretter, and their two children (v. 2, p. 377; v. 16, pp. 3-4). The defense argued that the picture, which had been taken before the divorce, was misleading. The prosecution argued that it was entitled to introduce a photograph of the victim, that the jury already knew the victim had been married to Brenda Gregg and was the father of twins, and that it was the only photo available of the victim (v. 16, pp5-6). The court ordered the prosecution to "crop" the photograph, removing Ms. Gregg from the picture (Id.).

The defendant contends that this was error, in that the photograph contained "irrelevant" and "prejudicial" material, but completely fails to explain in what way this photograph could be construed in either way. The jury was aware that Patrick Tretter was the father of twin children about whom he was very concerned. The picture was identified as a picture of Patrick Tretter and his kids (v. 16, p. 135). Nothing more was said about it than that.

The defendant's second contention is more unpersuasive than the first. He complains that because Ms. Gregg's image is still partially visible, this permitted the jury to "speculate that Tretter may have cut Brenda out of the photograph," and that this "might tend to suggest that Tretter had 'moved on'" (Opening Brief at 34). The picture was admitted though Brenda

Gregg's mother, Carolyn Bates, who identified it as a picture of the victim and her grandchildren, which was taken sometime in 1995 or 1996. The jury was perfectly aware, indeed, painfully aware, that the victim and Ms. Gregg were no longer married or romantically involved three-to-four years later, when the murder took place. The jury was also acutely aware, from the volumes of testimony on the subject, that the victim was in no way "over" his wife. Indeed, the prosecution conceded as much in its closing argument. Moreover, the fact that the picture was identified as one that had been taken several years previously would have alleviated any "confusion" the jury might have had in weighing this "conflicting" evidence.

2. The post mortem photograph of the victim's neck wounds

The defendant also contends that the trial court abused its discretion in admitting Exhibit 31, a close-up photograph of the knife wounds to the victim's face and neck.

The photograph at issue was admitted over defendant's objection, but his objection was that the picture was duplicative, not that it was "extremely graphic"[8] (Opening Brief at 36). However, on appeal he argues that it was unfairly prejudicial and that it "unnecessarily inflamed the passions of the jury" (Id. at 37).

Evidence that is otherwise relevant must nevertheless be excluded if its probative value is far outweighed by its tendency to unfairly prejudice the defendant. CRE 403; People v. White, 199 Colo. 82, 606 P.2d 847 (1980). Evidence is unfairly prejudicial only if it has a tendency to suggest a verdict on an improper basis, such as bias, shock, anger, or sympathy. People v.

[8] Mr. Portman: "Your honor, **I just object to 31 as being cumulative with 35**."
The Court: "What about the balance?"
Mr. Portman: "No objection."
(v. 19, p. 39) (emphasis added).

Nuanez, 973 P.2d 1260 (Colo. 1999). In reviewing the trial court's decision, the appellate court must assume the maximum reasonable probative value and the minimum prejudicial effect. People v. Gibbens, 905 P.2d 604 (Colo. 1995).

Whether to admit photographs of the victim of a crime that are shocking or gruesome is a decision entrusted to the sound discretion of the trial court. Absent an abuse of that discretion, the court's decision should be affirmed. People v. Scarlett, 985 P.2d 36 (Colo. App. 1998) (eight photographs taken in the morgue of the nude body of the child victim of vehicular homicide properly admitted to show nature and extent of the injuries resulting in death). Photographs are admissible not only to show the nature and extent of the victim's injuries, but also to show the victim's general condition following the offense as well as other matters of consequence. People v. Nhan Dao Van, 681 P.2d 932 (Colo. 1984).

Photographs do not become inadmissible merely because they show some shocking aspect of the crime, nor are they inadmissible merely because they are to some extent duplicative of other evidence already admitted. People v. Maass, 981 P.2d 177 (Colo. App. 1998); People v. Mattas, 645 P.2d 254 (Colo. 1982). Ultimately, the prosecution is permitted to prove its case with the evidence it believes is most probative. People v. McGregor, 757 P.2d 1082 (Colo. App. 1987). In this context, the trial court abuses its discretion only if its decision is manifestly arbitrary, unreasonable, or unfair. People v. Dunlap, 975 P.2d 723 (Colo. 1999).

The photograph at issue was taken at the time of the autopsy, and shows the head and neck injuries of the victim (v, 19, pp. 38-39). Thus, the photograph had "probative value" in that it showed the location and nature of the victim's wounds. People v. Marquiz, 685 P.2d 242, 248 (Colo. App. 1984). Moreover, when considering that the elements of intent, premeditation and

self-defense were at issue here, the picture becomes all the more relevant.[9] Indeed, the defendant was overheard saying "he was going to cut [the victim's] fucking throat out," and from the picture it is clear he kept his word. The picture shows eight separate wounds to the victim's head and neck (v. 19, pp. 42-43). The jury had every right to see the severe, violent nature of the victim's wounds in considering whether the defendant acted in self-defense, or whether he acted after reflection and judgment.

The photograph at issue does not suggest to the jury an improper verdict based upon "bias, shock, anger, or sympathy," and therefore it is not unfairly prejudicial. See People v. Nuanez, supra. Its probative value is not far outweighed by its rather minor prejudicial affect. See People v. White, 199 Colo. 82, 606 P.2d 847 (1980). It is no more gruesome than many properly admitted photographs of homicide victims and crime scenes. See, e.g., People v. Scarlett, supra; People v. Nhan Dao Van, supra; People v. Harris, 633 P.2d 1095 (Colo. App. 1981); People v. Christian, 632 P.2d 1031 (Colo. 1981); cf. People v.Ellis, 41 Colo. App. 271, 589 P.2d 494 (1978) (abuse of discretion to admit certain autopsy photographs, including one of child victim's "body split open from the neck to the crotch, exposing various internal organs," where alleged cause of death was subdural hematoma resulting from abuse). And, while such

[9] Defendant contends that "at trial, the fact that Patrick Tretter died of multiple stab wounds was not disputed, nor was the issue of causation contested," and that therefore the "graphic autopsy pictures were . . . of limited evidentiary value" (Opening Brief at 35). This could not be further from the truth. The autopsy pictures were crucial to showing the defendant's state of mind at the time of the attack. Likewise, defendant's reliance on Archina v. People, 135 Colo. 8, 307 P.2d 1083 (1957) is inapposite. Archina was a case in which the **identity** of the murderer was primarily at issue, and the court held that it was reversible error to admit morgue photos of the victim's naked body taken 17 days after the shooting and showing the results of extensive surgery performed after the shooting. See Marquiz, supra, at 248.

photographs are unpleasant to look at, jurors are not inherently any less capable than attorneys and judges at viewing them dispassionately for the useful information they contain.

VI. The trial court properly refused to dismiss a juror who appeared distressed from seeing Exhibit 31, after the court carefully confirmed that his reaction would not affect his ability to render a fair and impartial verdict.

Defendant next contends the court erred when it refused to dismiss a juror who became "visibly moved" while Exhibit 31 was being shown to the jury (v. 19, p. 45).

During the coroner's testimony, the prosecutor questioned him about several of the autopsy photographs, which were projected on screens for the jury to view. During the coroner's testimony about Exhibit 31, the court called a recess, because one of the jurors was "clearly affected by this [photograph]" (v. 19, p. 44).[10] The juror was "visibly obviously moved" and appeared to be "somewhat ashen" in color when the recess was taken (v. 19, p. 45).

After a 15-minute recess the court called the juror, Mr. Jahen, into the courtroom in the presence of counsel, but out of the presence of the rest of the jury. The court asked Mr. Jahen how he was feeling at that point, to which he replied, "I feel better now" (v. 19, p. 46). The court further stated:

> Well, we're not here to put jurors in an impossible situation and if you feel that this is something that's just affecting you to such a way that you cannot in good conscience for yourself or for your own condition **or for the fairness to the parties continue, you need to just tell me that now and if you think you can we'll move on**.

(v. 19, p. 46) (emphasis added). The juror indicated he thought he could continue.

[10] The defendant unfairly exaggerates the effect of the photo on the juror when he claims he "became ill and fainted" (Opening Brief at 37). There is no such evidence in the record.

He also indicated that his reaction was something that he expected might happen ahead of time, given his "active mind" (v. 19, p. 47). Lastly, Mr. Jahen indicated that he could continue to focus on the evidence in an impartial manner (v. 19, p. 48).

The defense requested that Mr. Jahen be excused, or in the alternative, that the court grant a mistrial (v. 19, p. 49). The court denied both requests but indicated it would continue to watch the jury (v. 19, p. 51).

The coroner finished testifying and the prosecution called several other witnesses before the court called the afternoon recess (v. 19, p. 145). At that point the defense attorney made a record that Mr. Jahen "had [earlier] had a very physical reaction where he almost appeared to pass out when he viewed photographs that contained a lot of blood," and that he "could not even look at the evidence" (v. 19, p. 146). The defense again requested the court release Mr. Jahen. The prosecution indicated that it had "observed the juror as well," and noticed that he watched the screen onto which the pictures were projected (v, 19, p. 147). The prosecutor noted that he "may not have looked at the big screen at times, but he was certainly watching [one of the smaller] screen[s]" (Id.). Finally, the court had a third perspective, and "observed that he did avert his glance at certain times, both to the screen in the jury box and the big screen, but he also was not averting his glance during part of these presentations" (v. 19, p. 148).

The court indicated that it would bring the juror back into the courtroom the next Monday, after giving him the three-day weekend to have a "period of reflection" about

his ability to serve (v. 19, p. 149). When Mr. Jahen appeared, the following colloquy took place:

The Court: Good morning, sir.
Mr. Jahen: Good morning.
The Court: I suspect you would anticipate that I would want to talk to you this morning as to how you feel about going forward after you've had a three-day weekend.
Mr. Jahen: **I feel fine**.
The Court: You were as we recall distressed at the displays we saw last week
. . . .
Mr. Jahen: Yes.
The Court: What do you think your ability is to render a fair and impartial verdict taking into consideration the pictures only as part of the evidence and not all of it?
Mr. Jahen: It's just part of the whole.
. . . .
The Court: All right. Tell me now what you think. Are you able to look at all of these issues and render a fair and impartial verdict?
Mr. Jahen: **I believe I can**.
The Court: Is there anything in your mind that suggests you couldn't?
Mr. Jahen: **Not that I can think of**.
. . . .
The Court: Have you had any conversation with your fellow jurors about the reaction you had last week?
Mr. Jahen: **No, none at all**.

(v. 20, pp. 8-10) (emphasis added). The defense raised no further objection after this record was made.

The defendant contends the court should have "excused" the juror after his "inability to consider all evidence in a rational matter became obvious;" however, the record is clear that Mr. Jahen informed the court that he could render a fair and impartial verdict. The fact that the juror was affected by the graphic nature of the photographs does not automatically signify that he could not render an impartial verdict according to the law and the evidence presented at trial. Indeed, the court gave him every opportunity to "bow out" gracefully, and clearly the juror felt he could go forward.

The defendant cannot show that Mr. Jahen's reaction created an actual bias either in favor of the prosecution or against the defendant. See People v. Macrander, 828 P.2d 234 (Colo. 1992). "If the trial court is satisfied that the juror will issue an impartial verdict, the juror should not be dismissed for cause." People v. Young, 16 P.3d 821, 823 (Colo. 2001). Here, the court properly refused to dismiss Mr. Jahen, because the juror was not biased in any respect.

VII. The trial court properly instructed the jury on the affirmative defense of self-defense, particularly since the defendant did not object to the instruction, and in fact requested the exact language about which he now protests.

Defendant next contends that the trial court erroneously instructed the jury on the affirmative defense of self-defense, because the instruction as given "lessened the prosecution's burden of proof." (Opening Brief at 41).

As is pertinent here, the use of physical force against another is justified under the following circumstances:

> Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate **and**: The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed **or of receiving great bodily injury; or** the other person is committing or reasonably appears about to commit . . . assault as defined in sections 18-3-202 and 18-3-203.

§ 18-1-704(2)(a) & (c), C.R.S. (2003) (emphasis added).

Here, the jury was instructed as follows:

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

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

(v. 2, p. 401) (emphasis added).

Defendant complains that the jury was inadequately instructed because instruction 19 "erroneously suggested that one could not use deadly force against another unless the other was armed with a weapon" (Opening Brief at 41). This argument fails for several reasons.

First of all, it is clear that the instructions would allow a person to use deadly force if "he had reasonable grounds to believe, and did believe, that he or another person was in imminent danger of being killed or of receiving great bodily injury." That language, in the second numbered paragraph of the jury instruction, allows a person to use deadly force without the other person being armed with a weapon.

Secondly, it was the defendant who requested the exact language about which he now complains. During the discussion regarding jury instructions the prosecutor objected to part of the language in the self-defense instructions as follows:

> . . . .[T]hat language is not actually correct (referring to another instruction) and does not actually track with what we have given as the elemental in this regard, the elemental being the elemental of self-defense . . . including a third paragraph which refers to second degree assault which includes the language 'bodily injury by means of a deadly weapon' **and so it is clear because the defense has requested that last section of the elemental of self-defense that there is now another way that a person could be**

> **perceiving a justified situation and that is someone is about to commit bodily injury by means of a deadly weapon on a person.**

It is obvious why the defense wanted the language exactly as it requested it. The whole theory here was that the defendant thought the victim was armed with a deadly weapon.[11] Indeed, the theory of the defense instruction read, in part, that the defendant wanted to "confront" the victim to discuss the continued threats against himself and his family, and that when he approached Mr. Tretter, "Mr. Tretter swung at him with a metallic object which later turned out to be the wrench on a keychain. Under these circumstances, [the defendant] contend[ed] he was reasonably in fear of **being assaulted with a deadly weapon** . . . " (v. 2, p. 436) (emphasis added).

Moreover, the defendant did not raise any objections to this jury instruction at trial. If a defendant lodges no objection to a trial court's jury instruction, a plain error standard should be applied in reviewing the instruction. People v. Garcia, 28 P.3d 340 (Colo. 2001). Under the plain error standard, a defendant must "demonstrate not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to the defendant's conviction." Bogdanov v. People, 941 P.2d 247, 255-56 (Colo. 1997). Defendant can make no such showing here.

[11] One of the few items the victim took with him when he believed he was meeting his ex-wife was a set of keys. The keys actually belonged to his father, from whom he borrowed them as he was leaving that night, because he could not find his own set. On the key chain was a tiny wrench, which measured approximately three inches long.

More importantly, the defendant's affirmative request led to the “error” here about which he now complains. Accordingly, he is precluded from challenging the instruction now. Under the doctrine of invited error, a party may not complain on appeal of an error that he or she has invited or injected into the case; a party must abide the consequences of his or her acts. People v. Zapata, 779 P.2d 1307 (Colo. 1989); People v. Gregor, 26 P.3d 530 (Colo. App. 2000).

The defendant also alleges the court erred when it refused to give a defense tendered instruction that would have apprised the jury that fists may be considered a deadly weapon. However, the instruction given exactly tracked the language of the statute as well as the pattern instruction. See § 18-1-901(3)(e)(I)-(IV); COLJI-Crim. 5:01- 5(10).

Fists have not been legislatively designated as inherently deadly weapons. Thus, **if fists come within the ambit of** "[a]ny other weapon, device, instrument, material, or substance, whether animate or inanimate," fists may be deadly weapons depending on the manner in which they are used. § 18-1-901(3)(e)(IV), C.R.S. (2003). The defense had every right to argue that the victim’s fists were deadly weapons here, but they were not entitled to this instruction. The court did not err in refusing it.

VIII. There was no cumulative error in this case.

Finally, the defendant contends that the combined impact of the aforementioned “errors” that occurred in his case requires reversal of his convictions.

The doctrine of cumulative error requires that numerous errors be committed, not merely alleged. People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986). Although numerous formal

irregularities may in the aggregate deprive a defendant of a fair trial, the record must demonstrate that to the extent any errors occurred, they cumulatively prejudiced the defendant's substantial rights or denied him a fair trial. People v. Thompson, 950 P.2d 608, 615 (Colo. App. 1997). If there is no error that substantially prejudiced the defendant's right to a fair trial, there is no error to compound. People v. Roy, 723 P.2d 1345 (Colo. 1986); see also People v. Auman, 67 P.3d 741 (Colo. App. 2002), cert. granted Mar. 24, 2003 (if the errors were harmless, their cumulative effect will not warrant a new trial).

Here, there was no reversible error in any of the substantive issues raised by the defendant. Because there was no reversible error, there was no cumulative error.

CONCLUSION

For the foregoing reasons and authorities, the order of the trial court should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **KATHLEEN A. LORD**, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this ___ day of 2003

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