CERTIFICATION OF WORD COUNT: 7,030

COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East Fourteenth Avenue, Suite 300 Denver, Colorado 80203	2008 AUG 14 P 3:15
Appeal from the District Court, City and County of Denver, Colorado Honorable Martin F. Egelhoff, District Judge Case No. 06 CR 10408, Courtroom 11	**▲ COURT USE ONLY ▲**
Plaintiff-Appellee: **THE PEOPLE OF THE STATE OF COLORADO** **Defendant-Appellant:** **MARTIN VILLANUEVA**	Case No.: 2007CA858
Counsel for Defendant-Appellant: Blain D. Myhre, #23329 Isaacson Rosenbaum P.C. 633 Seventeenth Street, Suite 2200 Denver, Colorado 80202 Phone No.: 303-292-5656 Fax No.: 303-292-3152 E-mail: bmyhre@ir-law.com	
OPENING BRIEF	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

I. Statement of the issues

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

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

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

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

II. Statement of the case

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

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

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

B. Statement of the Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Summary of the Argument

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

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

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

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

IV. Argument

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

1. Preservation of issue and standard of review

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

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

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

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

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

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

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

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

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

A. No, I don't.

Q. Have you owned a gun?

A. No, I don't.

Q. Did you shoot a 9 millimeter gun?

A. Yes.

Q. Who did it belong to?

A. My friends.

Q. And was that on a single occasion?

A. I think it was a couple of times.

Q. But you yourself never owned a gun?

A. No, never.

. . . .

Q. Have you ever owned a revolver?

A. No.

Q. Never owned a gun of any type?

A. No.

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

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

Q. Never had one that was yours?

A. No.

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

A. No.

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

A. No.

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

A. Yes.

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

A. Yes.

Q. And have you ever worked on guns?

A. No, I don't know.

Q. Ever taken a 9 millimeter apart?

A. No.

Q. Ever changed barrels, anything like that?

A. No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Preservation of issue and standard of review

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

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

2. Hearsay Statements to Mario Rivera

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

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

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

Under CRE 807, a hearsay statement not falling under any recognized hearsay exception is admissible if (1) the statement is supported by circumstantial guarantees of trustworthiness; (2) the statement is offered as evidence of a material fact; (3) the statement is more probative on the point for which it is offered than any other evidence which could be reasonably procured; (4) the general purposes of the rules of evidence and the interests of justice are best served by the admission of the statement; and (5) the adverse party had adequate notice in advance of trial of the intention of the proponent of the statement to offer it into evidence. *See People v. Fuller*, 788 P.2d 741, 744 (Colo. 1990) (decided under CRE 804(b)(5), which was later transferred to CRE 807).

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

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

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

3. Hearsay Statements to Juan Garcia

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Hearsay statements to Ilda Garcia

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

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

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

5. Hearsay statement to Mary Garcia

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

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

6. Conclusion on admission of hearsay statements

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

---

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

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

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

1. Preservation of issue and standard of review

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

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

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

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

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

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

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

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

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

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

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

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

1. Preservation of error and standard of review

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

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

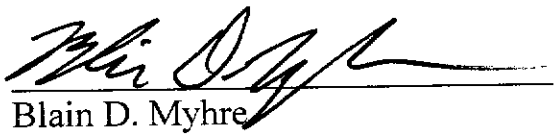
2. The cumulative effect of the trial court's errors requires reversal.

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

V. Conclusion

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

Respectfully submitted this 14th day of August, 2008.



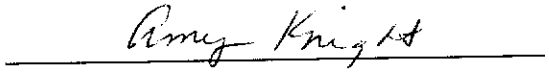
Blain D. Myhre
Attorney for Appellant

CERTIFICATE OF SERVICE

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

Catherine P. Adkisson, Esq.
Assistant Solicitor General
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
Counsel for the People

Charles W. Elliott, Esq.
1801 Broadway, Suite 1100
Denver, Colorado 80202
Trial Counsel for Defendant-Appellant



APPENDIX

MR. ELLIOTT: I am hoping that we will take the morning break shortly. I know we're close to being done, and I'm about to examine Mr. Rivera, and depending on the answers he gave about conversations he had with the gentleman named Neo, I may play some snippets of those conversations with him.

THE COURT: No problem, we'll break now.

MS. MORGAN: Judge, I never heard these conversations. If he's cross-examining my witnesses, I have a right to hear them. At some point, I don't know how long they are, how long the information that you have, but I do have a right to have that.

MR. ELLIOTT: If I'm using it for impeachment only and that's what I'm using it for, if he denies the conversation, to see if he can recognize his voice, I do not have to provide them in advance.

THE COURT: So you're going to confront him with some prior statements, is that correct? Tell us what you're going to do.

MR. ELLIOTT: I'm going to confront him with statements that he made subsequent to this event that he made in conversations with the man that has been testified to as Neo.

THE COURT: And are these inconsistent statements or what are they?

MR. ELLIOTT: They are inconsistent right now with regard to his knowledge of guns, his ownership of guns, et cetera.

THE COURT: That sounds like impeachment information, which I think you need to give to Ms. Morgan.

MS. MORGAN: And I also object to any relevance. I thought where he was going with the guns was the issue of sound and how a 9 millimeter sounds. What's the relevance of whether this witness in another time in another place has ever dealt with guns? How is that relevant?

MR. ELLIOTT: It is relevant because he denied ownership of guns, he's denied working knowledge of guns, and I think I can show that he has very good working knowledge of guns. He talks about changing barrels, he talks about shooting, things like that, and it is classic, absolute impeachment, and I will cite a case.

MS. MORGAN: What I believed the relevance was was the sound of the gun that night. This witness's knowledge of guns, how is that relevant to anything but the noise that night?

THE COURT: I think the relevance is on direct he said he saw a big gun, didn't know anything about

guns. Apparently he knows more about guns than he is saying he knows about guns. So it goes to credibility, right?

MR. ELLIOTT: That is all about credibility, yes, sir.

THE COURT: So if you're going to impeach him with statements, they need to be disclosed to the prosecution so they're on the same page. And I'll take a break and give you a chance to get squared away.

MR. ELLIOTT: Thank you.

MS. MORGAN: I would ask for all of the conversations that you have been provided, not just these snippets, because I don't know the context in which these questions were asked, nor do I know of other conversations where he may have denied. So I'm asking the Court to order him to provide that information to me.

MR. ELLIOTT: The snippets are very short. The whole conversations I have in that notebook. I was not going to put in whole conversations. And again, I do not have any intention to put it into evidence, for cross-examination only.

THE COURT: Is there context to the snippets that you're going to be asking, some contextual information also contained in it?

jail or could have been dead."

And then the other witness goes on to say, and I'm paraphrasing, you never got caught. And my witness, "I thank God because I never got caught or else I would be in fucking jail for the rest of my life." Again, I have absolutely utterly no context for it. And again, clearly, if this is a true statement from my witness, talking about a prior bad act -- I can go on for the Court.

THE COURT: Let me do this before you do that. What exactly, Mr. Elliott, do you intend to do so I have some idea what you're going to do and what you think it will be for?

MR. ELLIOTT: The first clips I would play is a series of clips that talks about his ownership and control over various weapons, one of them being one with a banana clip with a 30-round clip. He talks about wiping it down, wiping fingerprints of both of theirs off of the weapon. We segue into a different track with a different conversation where he talks about changing the barrels of a weapon so as to not be caught, changing barrels of a weapon, because it changes the grooves, and he doesn't use the word projectile, but in a bullet.

This goes to what is replete throughout this

case, which seems to be that Mario Rivera doesn't have knowledge of weapons, doesn't know what's going on, doesn't have guns. It goes to his credibility. It goes to what weapon, if any, was used.

And what I did before the break was laid the foundation to then ask whether or not you had these conversations, did you affirm that you had this weapon, that you lent it to Neo, that you took it back, things like that. If he denied the conversation, it would be my position and intention to play the tape where we have the two of them.

I do have a good faith basis that it is him. There are conversations that I was not going to elicit that clearly are referring to Mr. Villanueva and this case. I don't think there's any doubt about that. Then, if I got through that, then it would be questioning as to other items, including a series of statements to the effect that Sergio was there, Sergio being Guerro, Mr. Gonzales, and the snippet you just -- well, guns, Sergio there, that's probably about all I was going to use.

There is one other episode, if he is going to talk about his, because I'm going to question him about his role in drug trafficking with Benjie, Benjamin Garcia-Diaz, if any. If he denies that, there's an