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COURT OF APPEALS, STATE OF COLORADO
Court Address: 2 East 14th Avenue
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Appeal from the El Paso County District Court
Honorable Barbara Hughes, Judge
District Court Case No. 2017CR4200

PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

ERIC WILLIAM GRANT,
Defendant-Appellant.

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APPOINTED BY ALTERNATE DEFENSE COUNSEL

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Court of Appeals Case Number:

2018CA1139

MR. GRANT'S OPENING BRIEF

COURT OF APPEALS, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, CO 80202 El Paso County District Court Honorable Barbara Hughes, Judge District Court Case No. 17CR4200	**COURT USE ONLY**
PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. ERIC WILLIAM GRANT, Defendant-Appellant.	Court of Appeals Case Number: 18CA1139
Attorney: Casey J. Mulligan, Atty. Reg. No. 21987 Mulligan & Mulligan, PLLC 89 Gold Trl. Boulder, CO 80302 Phone: (303) 884-7863 E-mail: caseymulligan@me.com APPOINTED BY ALTERNATE DEFENSE COUNSEL	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. The brief contains 7,395 words. I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Casey J. Mulligan
Attorney at Law

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Introduction

An accused in a criminal case has a fundamental right to a fair trial. The rules of discovery were designed to ensure this right and to reduce the risk of "trial by ambush." To this end, the discovery rule requires the government to disclose to the accused all police reports in its possession or control, and all statements allegedly made by an accused to the police, well in advance of trial.

In this case, the government disclosed to the defense for the first time, on the seventh day of trial, Mr. Grant's alleged inculpatory statements to police from when he was arrested several months before. The trial court failed to impose a sanction sufficient to remedy this prejudice. This discovery violation thus denied Mr. Grant his rights to a fair trial, due process, and effective assistance of counsel.

This case also involves the erroneous admission of other acts evidence, as well as inadmissible opinion testimony from a detective that Mr. Grant was the robber seen in a surveillance video from the crime scene. The net effect of the errors was an unfair trial.

Statement of the Issues

I. Did the trial court err by failing to exclude a statement Mr. Grant allegedly made to police—which had been in the possession or control of the prosecution for seven months before trial but which was only

disclosed to the defense on the seventh day of trial—as a sanction for the prosecution's discovery violation?

II. Did the trial court abuse its discretion when it allowed a police detective to testify that, in his opinion, Mr. Grant was one of the robbers seen in a surveillance video from the crime scene?

III. Did the trial court abuse its discretion by admitting other acts evidence although the prosecution had failed to prove by a preponderance of the evidence that it was Mr. Grant who committed the other act?

Statement of the Case and Facts

The prosecution charged Eric Grant with first-degree murder (both after deliberation and as felony murder); first-degree assault; aggravated robbery; and conspiracy to commit first-degree murder. CF, pp 3-5. The charges stemmed from an incident on July 13, 2017, in which two men wearing construction safety vests entered a business called Full Throttle Auto, robbed the business, assaulted Spence Massey, and caused the death of owner George Maldonado.

At trial, Massey testified that he was at Full Throttle Auto with George Maldonado on July 13 to have some work done on his car. TR 5/31/18, p 150-151. A man with a beard showed up in a yellow jacket and a hard hat and acted as

though he was with Colorado Springs Utility. TR 5/31/18, pp 152:12-153:13. As Massey walked out to leave, another person grabbed him from behind and put a gun to his head. TR 5/31/18, p 155:5-14. The two men asked Maldonado to open the safe; and then the first one hit Maldonado with a gun. TR 5/31/18, p 156:21-25. The man asked Maldonado questions, but Maldonado didn't respond; and the man then kicked Maldonado. TR 5/31/18, p 159:10-15. The man in the yellow vest hit Massey with a gun, and took his wallet and watch. TR 5/31/18, p 160:1-13.

When police arrived, Maldonado was on the floor with his hands bound, breathing shallowly. TR 5/31/18, p 187. Emergency medical personnel soon followed; and determined that Maldonado was deceased. TR 5/31/18, p 48:10-13.

Police discovered that there was a recording of video surveillance from within the business; and downloaded it. TR 6/1/18, p 137:2-7. The video showed two suspects: a black male with a full beard, white hard hat and green reflective vest; and another suspect with a yellow cap and orange or pink vest. TR 6/1/18, p 137:11-25. Police released a small portion of the video to the news media. TR 6/1/18, p 139; Env., EX 362 (DVD).

Detective Rogers, who testified as an expert in digital forensics, enhanced the Full Throttle video to try to see if one of the male suspects in the video had a tattoo on his left arm. TR 6/1/18, p 172:20-25. Rogers testified that, even with

enhancement, he could not see if there was a tattoo on the arm of the male in the green vest. TR 6/1/18, p 173:3-5. The defense introduced photos of Mr. Grant depicting visible tattoos on his arms. EX (trial) D, E, G, and H, pp 3-6. Witness Brandi Compito testified that Mr. Grant had had the tattoos on his arms since at least December of 2016. TR 6/6/18, p 112:16-24.

The jury returned verdicts of guilty on all counts except one count of conspiracy to commit first degree murder. TR 6/12/18, pp 2-3. The trial court sentenced Mr. Grant to an aggregate sentence of life in prison without the possibility of parole. TR 6/14/18, p 9:6-14. This timely appeal follows.

Summary of the Argument

Issue I. Rule 16 of the Colorado Rules of Criminal Procedure requires the prosecution to disclose to the defense all police reports in its possession or control, and any statements allegedly made by the defendant to law enforcement, well in advance of trial. This requirement extends to all such information in the possession of law enforcement agencies who reported to the prosecutor with respect to the case in question.

Mr. Grant was arrested by Philadelphia police in October of 2017 on a homicide warrant from this case. He allegedly made a statement to the police that he was on the run from Colorado and didn't want the police to know who he was.

This statement, which was quoted in a report, was in the possession of the Philadelphia police for over seven months before trial; but the prosecution didn't disclose the statement and report to the defense until the seventh day of trial. The defense, meanwhile, had relied on the lack of any statements by Mr. Grant to the police in preparing its entire theory of defense and trial strategy, including opening statement. Thus, the defense was prejudiced by the late disclosure.

The trial court abused its discretion when it failed exclude the statement, which was the only sanction potentially sufficient to remedy the prejudice to the defense from the prosecution's in-trial disclosure of the statement.

Issue II. Lay opinion testimony is admissible when it is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. CRE 701. Opinion testimony is expert, rather than lay, opinion when the witness provides testimony that could not be offered without specialized experiences, knowledge, or training. A witness, whether lay or expert, may not form conclusions for jurors that they are competent to reach on their own.

Over defense objection, the court allowed a detective to testify that, in his opinion, Eric Grant was the bearded robber seen in the surveillance video from the crime scene. The jury had been observing Mr. Grant in trial for several days; the

detective had never seen Mr. Grant before beginning the investigation of this case; there was no evidence that Mr. Grant's appearance had changed in any significant way since the date of offense; and the jury was granted unrestricted access to the video during deliberations. Under these circumstances, the jury was in the same position as the detective to review the video and form an opinion as to whether the bearded man in the video was Eric Grant. There was no basis for concluding that the detective was more likely to correctly identify the robber in the video than was the jury. The trial court thus abused its discretion when it allowed the prosecution to elicit opinion testimony from the detective that the bearded robber in the Full Throttle surveillance video was Eric Grant.

Earlier in trial, the prosecution elicited testimony from the detective that police receive training to determine whether there are facial similarities between an individual in a photograph and a live person. But the prosecution had not endorsed or moved to qualify the detective as an expert witness. So, when the prosecution elicited the detective's opinion about whether the suspect in the video was Mr. Grant, it was eliciting expert opinion testimony in the guise of lay opinion. The trial court plainly erred by allowing this testimony.

Since the main issue at trial was whether the bearded robber from the video was Mr. Grant, and there was conflicting evidence about whether the suspect was Grant, the trial court's error necessitates reversal.

Issue III. Several months before the events leading to charges in this case, another attempted robbery occurred with similar circumstances. The victim in that case contacted police after seeing a news clip containing surveillance video footage from this case, indicating that one of the men in the video might be the one who tried to rob him earlier. But when police followed up by showing that victim a lineup containing a photo of Mr. Grant, the victim was unable to identify anyone from the lineup as being the man who tried to rob him.

In deciding whether to admit other acts evidence under CRE 404(b), a trial court must determine whether the prosecutor has proven to the court ,by a preponderance of the evidence, that the other act occurred **and** that the defendant committed the other act. *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991). The prosecutor failed to establish by a preponderance of the evidence that it was Mr. Grant who committed the earlier robbery; thus, the trial court abused its discretion in admitting the other acts evidence, and reversal is necessary.

Issue IV. Cumulative trial error necessitates reversal. The several errors at trial, in the aggregate, show prejudice to Mr. Grant's rights to due process and a fair trial.

Argument

I. The trial court abused its discretion, and reversibly erred, when it declined to exclude inculpatory statements Mr. Grant allegedly made to the police many months before trial—but which the prosecution didn't disclose to the defense until the seventh day of trial—as a sanction for the discovery violation.

A. Preservation and Standard of Review

On the seventh day of trial, the prosecution notified the court and defense counsel that Philadelphia police detectives had just provided the prosecution with a report containing inculpatory alleged statements by Mr. Grant when he was arrested seven months before trial. TR 6/7/18, p 75:6-10. The defense, noting that neither the statements nor the report had been provided in discovery, objected to the introduction or any mention of the statements. TR 6/7/18, p 76:7-14. The defense renewed its request to exclude the purported statement and any mention of it as a sanction for the prosecution's discovery violation. TR 6/7/18, pp 126-129. The court denied the defense's request. TR 6/7/18, p 134:14-19. The issue is thus preserved.

This Court reviews for an abuse of discretion a trial court's resolution of discovery issues and its decision whether to impose sanctions for discovery violations. *People v. Acosta*, 2014 COA 82, ¶ 10, 338 P.3d 472. Reversible error occurs where the discovery violation resulted in prejudice to the defendant. Id., ¶ 16.

B. Relevant Facts and Procedure

Philadelphia police officers, working with other law enforcement agencies, arrested Mr. Grant in Philadelphia on October 9, 2017, on an outstanding homicide warrant from El Paso County, Colorado. CF, p 334; EX K (trial), p 7. Mr. Grant was later extradited to Colorado from Philadelphia and placed in custody at the El Paso County Jail.

On April 25, 2018, the prosecution moved to continue the jury trial, asserting that, despite trying for months, it had been unable to obtain physical evidence relating to Mr. Grant's case from the Philadelphia Police Department. CF, p 322. At a pretrial hearing on the motion, the prosecution stated:

> To let the court know that regarding the evidence from Pennsylvania—from Philadelphia, Pennsylvania, that evidence was requested as soon as the Defendant was arrested and brought back … Our lead detective has contacted them numerous times, trying to speed it up….

TR 5/1/18, p 4:16-21. The trial court denied the motion to continue the trial. TR 5/1/18, p 6:7-10.

Initial discovery issues

On May 30, 2018—the first day of trial—the defense objected to the prosecution's late endorsement of two witnesses, Quincy Harding and Katie Sanchez. TR 5/30/18, p 12:12-21. Defense counsel noted that neither witness was mentioned in discovery; that the prosecution had only provided their names the day before trial; and that the prosecution had provided the defense an investigation report containing the witness's statements at 8:00 a.m. on May 30. TR 5/30/18, pp 13:25-14:5. The defense moved to exclude the two witnesses from testifying as a sanction for the late disclosure and discovery violation. TR 5/30/2018, p 15:13-16.

The prosecution responded that it had just obtained the names and statements of the witnesses during the week before trial; and that it had disclosed both to the defense immediately. TR 5/30/18, pp 16-17. The court denied the defense motion to exclude the witnesses. TR 5/30/18, pp 18:18-19:21.

On the fifth day of trial, the prosecution informed the court and counsel that a detective from Minnesota had recordings of interviews with prosecution witnesses Ingram and Berkness; and that the recordings had not previously been disclosed to the defense. TR 6/5/18, p 4:7-13. The court excluded certain of

Ingram's statements on the basis of a pretrial ruling; but did not address the untimeliness of the discovery. TR 6/5/18, p 23:24.

Late disclosure of Mr. Grant's statement to the police

On the seventh day of trial, during a recess, the prosecutor told the court and the defense that he had just received a report from Philadelphia detectives who were involved in the arrest of Mr. Grant; and that the report contained a statement Mr. Grant had made to one of the detectives. TR 6/7/18, p 75:6-10. The October 9, 2017 report indicated that Grant, when asked by a detective if he had identification, stated:

> I'm on the run from Colorado and you think I'm going to have identification? I want as little contact with you guys as possible and I definitely don't want you to know who I am.

EX L (trial), p 8. The defense objected to introduction of Mr. Grant's alleged statement or any mention of it, noting that the prosecution was required to obtain all discoverable information from the Philadelphia police and that the prosecution had been in regular contact with that agency. TR 6/7/18, p. 76:7-13; p 77:8-12.

The court denied the defense motion to exclude the statement:

> Well, first of all, I don't find any—any indicia of any malfeasance or lack of dilatory [sic] effort by the prosecution, nor do I find any secreting of any document by the prosecution. It was published to the prosecution today, so as far as any patent discovery violation, that is not supported by the record. Having found that, the document does have some, obviously, relevant

> information. So given the hierarchy of gradation sanctions, I decline to exclude that statement. However, I will give defense counsel an opportunity to talk to those—that individual in the hall and will consider other—other things for defense in terms of any remedy.

TR 6/7/18, p 77:13-24.

The court conducted a hearing on the discovery violation. Detective Pirrone of the Philadelphia Police Department testified that he e-mailed the report (Defense Exhibit L) containing Grant's statement to Detective Aulino of the Colorado Springs Police Department on the 10th or 11th of October, 2017; but then clarified that he had no independent recollection of sending that particular report to Aulino. TR 6/7/18, pp 120:7-121:12.

Aulino testified that he was in charge of gathering documents from the Philadelphia Police Department. TR 6/7/18, p 123:10-14. He then testified that the morning of June 7, 2018, was the first time he had seen the report. TR 6/7/18, p 123:15-24. Finally, Aulino confirmed that, in the multiple conversations he'd had with the Philadelphia detectives, they had never mentioned to him that Mr. Grant had made any statements to them. TR 6/7/18, p 126:9-11.

The defense agreed with the court that there was no bad faith or malfeasance by the prosecution. TR 6/7/18, pp 128:20-129:7. Defense counsel outlined the prejudice to the defense resulting from the discovery violation:

- A big part of defense counsel's argument in opening statement was that there were no statements made by Mr. Grant except for those he allegedly made to lay witness Julian;
- The defense's entire theory, trial strategy, and presentation were premised on the idea that there were no statements by Mr. Grant to anyone other than the alleged statements to lay witness Kerry Julian.

TR 6/7/18, p 127:3-20. Defense counsel noted: "Statements by the Defendant are the cornerstone or lack of statements are the cornerstone of any case." TR 6/7/18, p 127:20-21. Defense counsel then again requested that the court impose a sanction of exclusion of the alleged statement and preclusion of any mention to the jury related to the statement. TR 6/7/18, p 129:18-21.

The court again denied the requested sanction of exclusion, finding that allowing the defense a suppression hearing was a sufficient sanction. TR 6/7/18, p 134:14-19. The court then conducted a hearing on the defense motion to suppress the statement on the basis that the statement was elicited via custodial interrogation without a *Miranda* warning. TR 6/7/18, p 136:1-14. The court denied the motion to suppress. TR 6/8/18, p 9:13-14. Philadelphia Detective Bass testified before the jury shortly thereafter, reciting Mr. Grant's alleged statement. TR 6/8/18, p 32:11-23.

C. Law and Analysis

1. General legal framework

Colo. R. Crim. P. 16

Colo. R. Crim. P. 16 governs pretrial discovery. Rule 16 was designed to ensure a fair trial and reduce the risk of "trial by ambush." *People v. Arapahoe County Court*, 74 P.3d 429 (Colo. App. 2003). The rule requires the prosecution to provide the defense with, among other things:

- "police, arrest, and crime or offense reports, including statements of all witnesses" that are "within the possession or control of the prosecuting attorney," Crim. P. 16(I)(a)(1)(I); and
- "any written or recorded statements of the accused … and the substance of any oral statements made to the police or prosecution by the accused…." Crim. P. 16(I)(a)(1)(VII).

The prosecuting attorney's obligations

> extend to material and information in the possession or control of members of his or her staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.

Crim. P. 16(I)(a)(2). The rule requires the prosecutor to provide these items to the defense "as soon as practicable but not later than 21 days after the defendant's first

appearance at the time of or following the filing of charges….” Crim. P. 16(I)(b)(1). And,

> The prosecuting attorney shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.

Crim. P. 16(I)(b)(4).

If a discovery violation is brought to the court’s attention, the court can impose sanctions, including ordering the inspection of materials, granting a continuance, or prohibiting the party from introducing in evidence the material not disclosed. Crim. P. 16(III)(g).

Case law addressing discovery violations

“To remedy a discovery violation, the court should impose the least severe sanction that ensures compliance with the discovery rules and protects a defendant’s right to due process.” *People v. Palmer*, 2018 COA 38, ¶ 25. While a trial court’s decision whether to impose sanctions is reviewed for an abuse of discretion, that discretion is not unlimited. *People v. District Court*, 808 P.2d 831, 836 (Colo. 1991).

Among the factors a trial court should consider in fashioning an appropriate sanction for a discovery violation are:

(1) The reason for the delay in providing the requisite discovery;

(2) Any prejudice a party has suffered as a result of the delay; and

(3) The feasibility of curing such prejudice by way of a continuance or recess in situations where the jury has been sworn and trial has begun.

People v. Lee, 18 P. 3d 192, 196 (Colo. 2001); *see also People v. Castro*, 854 P.2d 1262, 1265 (Colo. 1993).

2. The prosecution violated Crim. P. 16

The prosecution's disclosure, for the first time during trial, of Mr. Grant's alleged statements to Philadelphia police and the report documenting those statements, violated the express requirements of Crim. P. 16. The prosecution team was in regular contact with the Philadelphia police about this matter; and the prosecution's request to continue the trial due to problems obtaining evidence from that agency shows that the prosecution was already aware that complete provision of information from that agency was an issue. The alleged statement, and the report documenting it, were known to the Philadelphia police for more than seven months before trial.

3. The discovery violation prejudiced Mr. Grant's defense

As defense counsel noted, the defense had relied on the discovery provided before trial in preparing for trial, developing a theory of the defense, and

presenting its case. And the discovery provided by the prosecution before trial did not contain any statements by Mr. Grant to any police officers. Thus, the defense asked no questions during jury selection concerning statements attributed by the police to defendants. And in opening statement, the defense emphasized that there were no statements by Mr. Grant to anyone besides lay witness Kerry Julian. Because the defense didn't receive the statements or the report until trial had already started, there was no way for the defense to investigate the circumstances surrounding the statements, including whether there were any recordings of the statements and whether there was equipment that could've recorded Mr. Grant's interactions with the police. The statements suggested that Mr. Grant knew he was being pursued by the police, and that he was fleeing to avoid being captured. To receive these damning inculpatory alleged statements for the first time on the seventh day of trial thus caused significant prejudice to the defense.

4. The court's sanctions didn't remedy the prejudice

Despite the clear nature of the discovery violation, the importance of the untimely-disclosed statements, and the obvious prejudice to the defense, the trial court rejected his request to exclude the statements. The trial court acknowledged that the remedy of allowing the defense extra time to interview the detectives who attributed the statements to Mr. Grant was not a sufficient remedy. But its decision

to hold a suppression hearing concerning any constitutional admissibility issues pertaining to the statements did nothing additional to cure the prejudice. The untimely provision of the statements in violation of Crim. P. 16 still prejudiced Mr. Grant's defense just as drastically as if there had been no in-trial suppression hearing. The hearing did nothing to cure the unfair damage resulting from the defense relying on the discovery provided before trial in preparing its entire theory and strategy of defense, only to learn near the close of evidence about inculpatory statements Mr. Grant allegedly made to the police.

This case stands in contrast to *Acosta*, *supra*. *Acosta* involved the prosecution's untimely disclosure, the day before trial, to the defense of a fourth interrogation of the defendant. The trial court there found a discovery violation, but imposed no sanction. A division of this court found the trial court did not err, noting that there was no prejudice to the defendant because he received the evidence **before** trial, he refused the offer of a continuance, and he used the information during cross-examination. *Acosta*, 2014 COA 82, ¶ 23. Additionally, the prosecution didn't even use the challenged information during trial. *Id*.

Here, the trial was nearly concluded by the time the prosecution disclosed Mr. Grant's statement to the defense. The newly disclosed statement was significant and would have impacted the defense's entire trial strategy, preparation,

and presentation of the case. Thus, based on the timing of the disclosure, it was not feasible to grant a continuance to try to remedy the prejudice. And, unlike in *Acosta*, here the prosecution elicited the statement through a detective, and then emphasized it twice during rebuttal closing:

- "It's all Eric Grant. Statements in Philadelphia, 'I'm on the run. I'm on the run from Colorado.'" TR 6/11/18, p 220:3-5;
- "And what the Defendant wants is just what he wanted in Philadelphia, not to be known. 'I'm on the run. I don't have identification. I don't want you to know who I am.'" TR 6/11/18, pp 220:23-221:1.

The prosecution's disclosure of alleged inculpatory statements by Mr. Grant to the police, created significant prejudice to his defense and impacted his rights to due process and a fair trial. By failing to impose any sanction that remedied this prejudice, the trial court abused its discretion; and reversal is required. *Acosta, supra; Lee, supra; Palmer, supra*.

II. The trial court abused its discretion when it allowed a detective to give opinion testimony that Mr. Grant was the bearded robber appearing in the surveillance video from the crime scene.

A. Preservation and Standard of Review

This issue is preserved in part. When the prosecution attempted to elicit Detective Aulino's opinion, the defense objected on two grounds: that the opinion testimony invaded the province of the jury; and that it was not relevant and useful to the jury. TR 6/8/18, pp 76:14-77:21. The court overruled the objection and allowed the testimony. TR 6/8/18, p 78:2-3.

A trial court's decision to admit opinion testimony is reviewed for an abuse of discretion. *Campbell v. People,* 2019 CO 66, ¶ 21. A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Id.* An appellate court reviews preserved, nonconstitutional errors for harmless error. *Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116. Under this standard, reversal is required if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Id*.

The defense didn't object to the testimony on the basis that it was expert opinion testimony in the guise of lay opinion. Thus, that portion of the issue is unpreserved. Unpreserved errors are reviewed under the plain error standard, which requires reversal when the error "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Hagos, supra*, ¶ 14.

B. Relevant Facts and Procedure

The prosecution introduced into evidence the surveillance video from Full Throttle, which showed the two robbers inside of the business. EX (trial) #391. The prosecution played for the jury the portion of the video showing the suspects entering the business, inside the business, and leaving. TR 6/8/18, pp 79:10-80:5.

The prosecution elicited from Detective Aulino that he'd viewed the surveillance video from the crime scene "dozens of times," and that he had become very familiar with the facial features and body sizes of the two suspects. TR 6/4/18, p 94:17-25. Then, the following exchange occurred between the prosecutor and Aulino:

> Q: All right. And **is it part of police training** to be able to look at a photograph and be able to look at a person's face and see if there are similarities and features that appear in both?
>
> A: Yes.

TR 6/4/18, p 96:21-25 (emphasis added).

Four days later, the prosecution again elicited testimony from Aulino that he'd watched the surveillance video dozens of times, using "a lot of attention;" and that he'd seen Mr. Grant face-to-face sometime **after** his arrest, as well as at various court hearings since the arrest. TR 6/8/18, pp 75:15-76:13. The prosecutor then asked Aulino:

> Based on your observations of the video and your observations of the Defendant, Eric Grant, in person and in D.M.V.

> photographs, do you have an opinion as to whether the person in the video is the Defendant or not?

The defense objected. TR 6/8/18, p 76:14-19.

At the ensuing bench conference, defense counsel asserted that the opinion invaded the province of the jury; and that the opinion wouldn't be useful and relevant to the jury since there'd been no change in Mr. Grant's appearance during the relevant time frame. TR 6/8/18, pp 76:25-77:21. The trial court overruled the objection. TR 6/8/18, p 78:2-3. The prosecution then elicited the following opinion testimony from Aulino:

> Q: (By Ms. Vellar) Detective Aulino, do you have an opinion as to whether the Defendant, Eric Grant, is the person in the video?
>
> A: Yes. I mean, yes, or I wouldn't have—I wouldn't have written the arrest warrant and been in this position if we didn't, yes.
>
> Q: Okay. And do you recognize Eric Grant from the video?
>
> A: From the video?
>
> Q: Yes. Once you saw him in person, did you recognize him from the video?
>
> A: Yes, uh-huh.

TR 6/8/18, p 78:5-15.

C. Law and Analysis

1. Opinion testimony

CRE 701 and 702 govern admissibility of lay and expert opinion testimony, respectively. CRE 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

CRE 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Colorado Supreme Court established a test in *Venalonzo v. People*, 2017 CO 9, for determining whether testimony is lay or expert testimony:

> [I]n determining whether testimony is lay testimony under [CRE] 701 or expert testimony under CRE 702, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.

2017 CO 9, ¶ 23, 388 P.3d 868.

A lay witness can testify regarding the identity of a person depicted in a video recording if there is some basis for concluding that the witness is more likely to correctly identify the defendant than is the jury. *Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996). "Lay opinion testimony is permitted under Rule 701 because 'it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a firsthand witness to a particular event.'" *People v. McFee*, 2016 COA 97, ¶ 76, *citing United States v. Freeman*, 730 F.3d 590, 595 (6th Cir. 2013). Thus, some courts have found that "a witness is only permitted to give her opinion or interpretation of an event when she has some **personal** knowledge of that incident." *See, e.g., United States v. Fulton*, 837 F.3d 281, 291 (3rd Cir. 2016) (emphasis added).

2. *The court erred by admitting the testimony under CRE 701*

The jury had seen Mr. Grant on a constant basis for several hours a day during the six days of trial preceding Aulino's opinion testimony. There was no evidence that Mr. Grant's appearance had changed in any significant way since before the Full Throttle robbery. And the court ruled as follow concerning the jury's access during deliberations to the surveillance video from the crime scene:

> All right. I'm going to go ahead and let the jury decide how frequently and the method in which they want to view those.

> Obviously, I want to have a clean computer if they want to see those … So I won't put any restrictions based on the *Rael* case cited by the prosecution and noting that these pieces of evidence are disparate from *DeVella*.

TR 6/11/18, pp 157:19-158:1. Thus, the jurors had unrestricted access to the surveillance video; and could watch it as many times as they wanted to.

Under these circumstances, as in *McFee*, *supra*, the jury was in the same position as the detective to review the video and form an opinion as to whether the bearded suspect in the video was Eric Grant. As with the detective in *McFee*, Detective Aulino wasn't present when the crime captured on video occurred; and his almost-entirely-in-court experience of observing Mr. Grant did not put him in any better position to identify Grant. Thus, his opinion would not have been helpful to the jury. "A witness, lay or expert, may not form conclusions for jurors that they are competent to reach on their own.' *McFee*, *supra*, ¶ 76. But this is exactly what Aulino's testimony did. Thus, the trial court abused its discretion in admitting Aulino's opinion testimony that Mr. Grant was the bearded man in the surveillance video. *Id.*

3. The error wasn't harmless

The sole significant issue at trial was identification: Whether the prosecution had proven that Mr. Grant was the man with the beard, as seen in the surveillance video. And while other lay witnesses opined that the bearded man from the video

resembled Mr. Grant, the defense pointed out that the bearded man in the video did not appear to have any tattoos, while Mr. Grant had obvious tattoos on his arms (see, e.g., EX D, E, G, H (trial), pp 3-6). So, Detective Aulino's erroneously admitted opinion that Mr. Grant was the bearded robber in the surveillance video likely substantially influenced the jury's verdict and affected the fairness of the trial proceedings, necessitating reversal. *Hagos, supra*.

4. *The trial court plainly erred by admitting Aulino's expert opinion in the guise of lay opinion testimony.*

Aulino had earlier testified that it was "part of police training" to be able to look at a photograph and look at a person's face, and then determine if there are similarities. Thus, when Aulino testified that, in his opinion, Mr. Grant was the suspect with the beard in the surveillance video, the jury had already heard that Aulino had received special training as a police officer in facial recognition and comparison. Since the opinion was thus based at least in part on Aulino's police training, it was expert opinion testimony; and the trial court erred in admitting it as lay testimony. *Venalonzo, supra*; CRE 701, 702.

The error was obvious: the Colorado Supreme Court issued its definitive test on CRE 701 and 702 in *Venalonzo* more than a year before this case went to trial. And because the improperly admitted opinion testimony went to the central issue in dispute in the trial—whether Grant was the bearded man in the video—the error

"so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction;" thus, this Court must reverse. *Hagos, supra*.

III. The trial court abused its discretion when it admitted other acts evidence of a different robbery after the prosecution had failed to prove by a preponderance of the evidence that it was Mr. Grant who had committed the other robbery.

A. Preservation and Standard of Review

The defense filed notice of its request for the prosecution to specify any instances of prior crimes, wrongs, or acts it intended to introduce at trial. CF, p 30. The prosecution responded that it intended to introduce evidence of a March 29, 2017 attempted robbery of Ricky Williams ("Williams robbery"). CF, p 53. The defense objected. CF, p 65. The trial court ruled in writing that the evidence was admissible for the purpose of establishing identity. CF, pp 384-87. Thus, this issue is preserved.

An appellate court reviews a trial court's admission of evidence for an abuse of discretion. *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009). A trial court abuses its discretion in admitting evidence when its decision is manifestly arbitrary, unreasonable, or unfair. *Kaufman v. People*, 202 P.3d 542, 553 (Colo. 2009). Where a defendant contemporaneously objects to the evidence, an appellate court reviews for harmless error. *Yusem*, 210 P.3d at 469. An error is not harmless

if there is a reasonable probability that the error contributed to the defendant's conviction by substantially influencing the verdict or affecting the fairness of the proceedings. *Hagos, supra*, ¶ 12.

B. Relevant Facts and Procedure

On March 29, 2017, Ricky Williams was robbed at gunpoint in his Colorado Springs home by a man wearing a construction safety vest who initially claimed to work for the local utility company. TR 6/11/18, pp 55-60. When Williams struggled against the man, the perpetrator, who was armed with a handgun, shot at him. TR 6/11/18, p 63:9-21. Williams was unable to provide a good description to the police, remembering mostly that the suspect had a beard. TR 6/11/18, pp 72:25-73:3.

Around July 14, 2017, police released to the media part of the Full Throttle surveillance video, in which the two suspects can be seen entering and leaving the shop. CF, p 53. Soon thereafter, Mr. Williams contacted the police and told them that the unidentified man with the beard from the surveillance video was the same man who tried to rob him in March. CF, p 53. On July 24, 2017,
the police showed Mr. Williams a photographic lineup which contained Mr. Grant's picture. Mr. Williams did **not** identify Mr. Grant as the robber. CF, p 53; TR 4/13/18, p 64:7-20.

The prosecution filed notice that it intended to introduce the Williams attempted robbery as other acts evidence under CRE 404(b). The court held a pretrial hearing, by offer of proof, on the admissibility of the evidence. TR 4/13/18, pp 63-67. The court then issued a written ruling permitting the admission of the Williams attempted robbery for the limited purpose of establishing identity. CF, pp 384-386.

At trial, Williams made a first-time, in-court identification of Eric Grant as the person who attempted to rob him in the March 29 incident. TR 6/11/18, p 83:2-9.

C. Law and Argument

1. Legal framework for admissibility of 404(b) evidence

"All relevant evidence is admissible unless otherwise provided by constitution, statute, or rule." *Yusem*, 210 P.3d at 463. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*.; CRE 401. A trial court should exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice (CRE 403), or if it is used to prove the character of a person to show he

or she acted in conformity with that character on a particular occasion. (CRE 404(b)). *Id.*

The admission of other act evidence may "unfairly expose [] a defendant to the risk of being found guilty based on bad character rather than on evidence relating to the charged offense." *People v. Lopez*, 129 P.3d 1061, 1064 (Colo. App. 2005). Accordingly, CRE 404(b) generally prohibits admission of other crimes, wrongs, or acts. The general prohibition stems from other acts evidence having "a distinct and unmistakable potential for unfair prejudice." *People v. Rath*, 44 P.3d 1033, 1043 (Colo. 2002). However, such evidence may be admissible for other purposes such as proof, motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. CRE 404(b); *Yusem*, 210 P.3d at 463.

Before admitting other acts evidence,

> the trial court, on the basis of all the evidence before it, must be satisfied by a preponderance of the evidence that the other crime occurred **and that the defendant committed the crime**.

People v. Garner, 806 P.2d 366, 373 (Colo. 1991) (emphasis added); *see also People v. Raehal*, 2017 COA 18, ¶ 33; and *People v. Muñoz*, 240 P.3d 311, 319 (Colo. App. 2009). If so, the court must then perform an admissibility analysis under *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990), and specifically determine that (1) the evidence relates to a material fact; (2) the evidence is

logically relevant; (3) the logical relevance is independent of the immediate inference that the defendant was acting in conformity with his bad character; and (4) the evidence has probative value that is not substantially outweighed by the danger of unfair prejudice. *Spoto*, 795 P.2d at 1318.

2. The court abused its discretion

Here, the trial court made a detailed written *Spoto* analysis of the admissibility of the March 29, 2017 evidence. And in its ruling, the court noted that "the prosecution must prove by a preponderance of the evidence that the prior acts actually occurred;" and found this requirement "satisfied based on the Court's review of the record." CF, p 384. But the trial court was silent on the other burden from *Garner, supra*, that the prosecution must meet: to prove by a preponderance of the evidence that the defendant committed the other act.

The prosecution failed to prove this condition precedent by a preponderance of the evidence. The police suspected that Mr. Grant was the man with the beard seen in the Full Throttle Audio surveillance video. After Williams saw the news release of the video, he told the police that he thought the bearded man in the video was the same man who tried to rob him. But when the police then showed Williams the lineup containing Eric Grant's picture, Williams did not identify Mr. Grant as the man who had tried to rob him.

Because the prosecution failed to prove to the trial court by a preponderance of the evidence that it was Mr. Grant who committed the March 29 attempted robbery, the trial court abused its discretion in admitting the other acts evidence. *Garner, supra; Raehal, supra; Muñoz, supra*.

3. The error was not harmless

And the error was not harmless. Identity of the bearded suspect was the central issue at trial. The evidence supporting the prosecution's theory that Mr. Grant was the man with the beard in the Full Throttle surveillance video was far from overwhelming: for example, as the defense noted, while Mr. Grant had obvious tattoos on his arms, there were no tattoos visible on the bearded suspect in the surveillance video. And as the Colorado Supreme Court has noted, "[e]yewitness identifications are extremely powerful evidence." *Garner v. People*, 2019 CO 19, ¶ 1. With Williams' first-time in-court identification of Grant as his attacker in the other crime, evidence of the other crime almost certainly had a significant impact on the jury. There is a "reasonable probability that the error contributed to the defendant's conviction by substantially influencing the verdict or affecting the fairness of the proceedings;" and this Court should reverse. *Hagos, supra*; *Yusem*, 210 P.3d at 469.

IV. Cumulative error requires reversal

A. Standard of Review

The doctrine of cumulative error requires that numerous errors be committed, not merely alleged. *People v. Blackwell*, 251 P.3d 468, 477 (Colo. App. 2010). This Court reverses for cumulative error where, although individual allegations of error may be deemed harmless and not require reversal, in the aggregate those errors show prejudice to a defendant's substantial rights and, thus, the absence of a fair trial. *People v. Stewart*, 2017 COA 99, ¶ 39.

B. Argument

Two of the errors discussed above went directly to the central issue of whether Mr. Grant was the bearded robber in the surveillance video. The 404(b) evidence from the victim of an earlier robbery, coupled with the detective's opinion testimony that the bearded robber in the video was Mr. Grant, constituted significant evidence that shouldn't have been been admitted at trial. Considered with the court's failure to impose a sanction of exclusion for the prosecution's in-trial disclosure of inculpatory statements Mr. Grant allegedly made to Philadelphia police, the net effect was to deprive Mr. Grant of his rights to due process and a fair trial. U.S. Const., Amend. V, VI, XIV. This Court should reverse.

Conclusion

For the reasons and authorities stated above, this Court should reverse Mr. Grant's convictions and remand for a new trial; or provide such other relief as the Court deems appropriate.

Respectfully submitted,

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Certificate of Electronic Service

I certify that on the 26th day of June, 2019, this Opening Brief was served on opposing counsel (Colorado Attorney General) through Colorado Courts E-Filing per defense request.

Casey J. Mulligan