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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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Court of Appeals Case Number:

2018CA1139

MR. GRANT'S REPLY 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 3,305 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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In addition to the arguments and authorities in the Opening Brief, Mr. Grant now replies to the State's Answer Brief ("AB").

Statement of the Case and Facts

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.

On October 9, 2017, Eric Grant was arrested in Philadelphia on a warrant from El Paso County, Colorado, issued in connection with this case. The jury trial began on May 30, 2018. On the seventh day of trial, the prosecution disclosed that it had just received a report from Philadelphia detectives who assisted in Grant's arrest. The report, dated nearly *nine months before trial*, stated that Grant told the Philadelphia police:

> 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.

A. The prosecution committed a discovery violation.

The State contends there was no discovery violation because the statement "was not within the possession or control of the Colorado Springs Police

Department or the prosecution." AB, p 16. At trial, the prosecution didn't contest the trial court's finding that a discovery violation occurred; thus, this argument is waived.

But, even if the prosecution hadn't waived this argument, the State's contention is wrong.

Crim. P. 16(I)(a)(3) states:

> The prosecuting attorney's obligations under this section (a) 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. (emphasis added)

As the State concedes, Detective Pirrone of the Philadelphia Police Department "was responsible for providing the relevant arresting information to Detective Steve Aulino, who was in charge of collecting information from the Philadelphia Police Department." AB, pp 10-11. Aulino testified that he had several conversations with Philadelphia detectives after Mr. Grant's arrest. *Id.*, p 11. And, the Philadelphia Police Department arrested Mr. Grant on the outstanding homicide warrant from El Paso County. CF, p 334; EX K(trial), p 7. Thus, contrary to the State's argument, the Philadelphia police both participated in the investigation of the case *and* reported to the prosecution on this case. Rule 16

required the prosecution to timely disclose the alleged statement; and its failure to do so violated Rule 16.

The State relies on *People v. Garcia*, 690 P.2d 869, 874 (Colo. App. 1984; opinion issued March 22, 1984), to support its argument. That reliance is misplaced; two months **after** *Garcia*, the Colorado Supreme Court rejected the proposition:

> We do not mean to imply that the prosecutor's duty to disclose is limited to reports in the physical possession of the district attorney's office or the local law enforcement agency primarily responsible for the investigation of the case. Under Crim. P. 16(I)(a)(4), the prosecutor's duty of disclosure extends to material and information in the possession or control of all law enforcement agencies which "have participated in the investigation or evaluation of the case and [which] either regularly report, or with reference to the particular case have reported, to his office.

Chambers v. People, 682 P.2d 1173, 1180 n. 13 (Colo. 1984) (issued May 21, 1984). The prosecutor's disclosure obligation thus extended to material and information in the possession or control of the Philadelphia Police Department. The failure to timely disclose Grant's statement—which the Philadelphia Police had in their possession and control for nine months before trial—was a discovery violation.

The State asserts that the prosecution's earlier motion to continue the jury trial was "not based on its inability to obtain evidence from the Philadelphia police;

rather, it was based on the fact that the [CSPD] had received the physical evidence from Philadelphia that same week…." (AB, p 16). But at the hearing on the government's motion to continue, the prosecutor 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**. They have some weird thing in Philadelphia where they had to keep the evidence to do their own swabbing or what not. **Our lead detective has contacted them numerous times, trying to speed it up**. They—I guess they're so busy. I don't know what the deal is in Philadelphia, but it was finally received last week. Regarding—and that piece of evidence is a firearm that has potential biological matter on it, so it does need a DNA analysis on it.

TR 5/1/18, p 5:16-25; *see also* CF, p 322 (prosecution motion to continue, ¶ 2: "The People have been attempting to get that evidence delivered to the [CSPD] for several months."). The State also contends that this delay only concerned physical evidence, and that the prosecution had no reason to believe the Philadelphia police were in possession of any statement yet to be disclosed. But, the prosecution's request to continue the trial due to the difficulty in obtaining discoverable material from the Philadelphia Police Department shows that the prosecution was aware of a problem in maintaining the flow of information required by Crim. P. 16(I)(b)(4).

B. The court's sanction didn't cure the prejudice to Mr. Grant.

The State argues that any prejudice resulting from the discovery violation was sufficiently cured by the court holding a suppression hearing. In support, the State contends that trial counsel **only** argued that the late discovery was prejudicial for two reasons: because of counsel's reference in opening argument to the absence of any admission of guilt to the police; and because there had been no opportunity to move to suppress the statement. AB, p 19. But, defense counsel also argued that the prejudice resulted from the defense's entire theory, trial strategy, and presentation being premised on there being no statements by Grant to the police. TR 6/7/18, p 127:5-10. And as trial counsel noted:

> Statements by the Defendant are the cornerstone or lack of statements are the cornerstone of any case. Defendant's statements are—are a huge issue in any criminal trial.

TR 6/7/18, p 127:21-24.

Because it impacted the Mr. Grant's entire trial preparation, theory of defense, trial strategy, and presentation, the late disclosure near the end of trial of this inculpatory statement was highly prejudicial. And the prejudice was compounded by the fact that defense counsel told the jurors in opening statement that they wouldn't hear any inculpatory statements by Mr. Grant to anyone besides Julian. The revelation to the jury of the statement on the second-to-last day of trial

directly contradicted defense counsel's opening statement, damaging defense counsel's credibility with the jury.

The State argues that, because the Philadelphia police officers involved "testified in detail regarding the circumstances surrounding [Grant's] arrest and booking," there was no prejudice to the defense from the inability to investigate whether there were any recordings of the alleged statement and, if not, why that was so. AB, p 21. This argument lacks merit. Competent defense counsel would've independently investigated, before trial, all circumstances surrounding such an important statement, rather than merely relying on the word of the police.

The State analogizes this case to *People v. Zadra*, 2103 COA 140. But *Zadra* is distinguishable: there, a division of this Court held that the trial court didn't abuse its discretion when it **failed to dismiss the case** as a sanction for the prosecution's untimely disclosure during trial of handwritten notes of the defendant. In *Zadra*, the trial court prohibited the prosecution from using the defendant's notes as an exhibit; the prosecution didn't use the defendant's notes; and the detective who testified concerning Zadra's actions testified on cross-examination that he didn't rely on the late-disclosed notes for his trial testimony. *Id*., ¶ 13. Here, in contrast, the trial court allowed the prosecution to admit Mr. Grant's statement; and the prosecution relied on the statement in rebuttal closing.

The prejudice to Mr. Grant far exceeded any speculative prejudice to the defendant in *Zadra*.

Considering the timing of the disclosure; the impact on every aspect of the defense preparation of the case; the defense's reliance in opening statement and for the first six days of trial on the absence of such a statement; and the prosecution's use of the statement during trial, the prejudice to Mr. Grant's due process right to a fair trial was substantial. The trial court's allowance of an in-trial suppression hearing did nothing to cure the prejudice. Thus, the trial court abused its discretion by rejecting the requested sanction of exclusion; the error resulted in prejudice to Mr. Grant; and this Court should reverse. *People v. Palmer*, 2018 COA 38, ¶ 25; *People v. District Court,* 808 P.2d 831, 837 (Colo. 1991)("In fashioning a sanction … a court must strive to restore as nearly as possible the level playing field that existed before the discovery violation."); *see also People v. Lee*, 18 P.3d 192 (Colo. 2001).

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

An error is plain "if it is obvious and substantial and so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *People v. Wester-Gravelle*, 2020 CO 64, ¶ 28. An error is obvious when it contravenes a clear statutory command, a well-settled legal principle, or Colorado case law. *Id*. An error so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction when "a **reasonable possibility** exists that [any error] … contributed to [the] conviction." *Cardman v. People*, 2019 CO 73, ¶ 39, *quoting People v. Lozano-Ruiz*, 2018 CO 86, ¶ 5 (emphasis added).

B. Argument

1. *The court erred by admitting Aulino's testimony under CRE 701*

The State claims that the jurors didn't have the face-to-face contact with Mr. Grant that Detective Aulino did. AB, p 29. But this is not so: the jury saw Grant directly for nine days, for several hours each day, sitting at the defense table between his lawyers. This was more extensive, face-to-face contact than Aulino's brief encounter with Grant after his arrest and return to Colorado.

The State analogizes this case to *People v. Vigil*, 2015 COA 88M, in which a division held that the trial court didn't err in admitting a police officer's testimony

comparing shoeprints to a defendant's shoes under CRE 701. But, as a division of this Court noted:

> 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 on 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 (*quoting United States v. Freeman*, 730 F.3d 590, 595 (6th Cir. 2013)). Here, Aulino wasn't a firsthand witness to the event; and the jury could experience the surveillance video themselves. Thus, the jury was in precisely the same position as the detective to see the suspect in the video. As in *McFee*, "[the detective's] opinion could not have been helpful to the jury because it was based on exactly the same information the jury had;" in this instance, the surveillance video.

But, argues the State, the fact that the suspect in the surveillance video "took care and effort to disguise himself [by wearing a hat, sunglasses, and gloves] … made it more difficult for the jury to correctly identify him." AB, p 31. The State doesn't explain why this fact wouldn't also have made it more difficult for Detective Aulino to identify the suspect; it would have—unless Aulino had some special skill or training. But if that is the case, Aulino's testimony was expert opinion.

2. Aulino's testimony was expert opinion in the guise of lay opinion.

The State claims that Aulino "did not base his opinion that Defendant was one of the two robbers seen in the surveillance video on any specialized knowledge or training." AB, pp 31-32. But Aulino's opinion testimony must be viewed in the context of his earlier testimony that it was part of his "police training" to detect similarities between photographs of individuals and people's faces. TR 6/4/18, p 94:17-25. *See Venalonzo v. People*, 2019 CO 9, ¶ 11 ("[I]t is the nature of the experiences that could form the opinion's basis that determines whether the testimony is lay or expert opinion."). None of the jurors would have had special "police training" in finding similarities between photographs of individuals and people's faces. Aulino's testimony was expert opinion in the guise of lay opinion.

Finally, the State contends that Aulino's testimony was cumulative to that of others who testified that Mr. Grant appeared to be one of the robbers in the video. But, Aulino was the only witness who testified to having some kind of training in facial comparison and recognition. Because Aulino's testimony was expert opinion in the guise of lay opinion, the jury likely gave this testimony extra weight, particularly since Aulino is a police detective. This improperly admitted opinion evidence was especially harmful because it went directly to the central issue in the case: whether the bearded suspect in the surveillance video was Eric Grant.

Aulino's opinion testimony that Mr. Grant was the bearded robber in the surveillance video was unhelpful to the jury; thus, it was error to admit the testimony under CRE 701. And because Aulino—who hadn't been endorsed or qualified as an expert—had testified to receiving police training in this area, it was expert opinion improperly admitted in the guise of lay opinion. The trial court thus abused its discretion when it admitted the testimony. This error is reversible under both the harmless and plain error standards. *Venalonzo, supra; People v. Ramos*, 2017 CO 6, ¶¶ 8, 9; *see also People v. Stewart,* 55 P.3d 107, 124 (Colo. 2002) (where officer's testimony is based in part on specialized knowledge or experience, the officer "must be properly qualified as an expert.").

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. The trial court abused its discretion.

Before admitting evidence of uncharged misconduct under CRE 404(b), a trial court must analyze the evidence under CRE 104(a) and admit it only if the court is satisfied by a preponderance of the evidence that (1) the CRE 404(b) acts occurred; and (2) the defendant committed the acts. *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991); *People v. Munoz*, 240 P.3d 311, 319 (Colo. App. 2009).

At trial, over defense objection, the prosecution introduced 404(b) evidence of another robbery ("Williams robbery").[1] The State argues that "substantial evidence showed that Defendant was the bearded man in the surveillance video;" and that 'Williams was certain that the bearded man [in the surveillance video] was the intruder who attempted to rob him." AB, p 38. But, there was no *pretrial* identification as to the 404(b) case; Williams couldn't identify Grant from a photo lineup containing Grant's picture. CF, p 53; TR 4/13/18, p 64:7-20. Thus, in order to find by a preponderance of the evidence that Grant committed the Williams robbery, the trial court would have had to **assume** that Grant was the bearded suspect in the surveillance video. But the government's stated purpose for admitting that evidence was to **prove** that Grant was the bearded suspect in the surveillance video, which was the central issue in dispute in the trial.

The State cites *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980), in support of the proposition that "similarities between the crimes were sufficient to raise an inference that the same person" committed both crimes. But, *Brown* is distinguishable: unlike in Mr. Grant's case, in *Brown* there was an eyewitness identification of the defendant as the perpetrator of the 404(b) robbery. *Id*.

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[1] A jury acquitted Mr. Grant in the "Williams robbery" case, El Paso County District Court Case No. 17CR6081, on August 12, 2019.

B. The error wasn't harmless.

The State argues that any error in admission of the 404(b) evidence was harmless, contending that the evidence was only a "small part" of the trial and that the prosecutor made only "brief and passing" references to it. AB, p 42. But the prosecution relied extensively on the 404(b) evidence. In initial closing, the prosecutor twice referred to the Williams robbery. TR 6/11/18, pp 188-89; 195:21-24. And in rebuttal closing, the prosecutor again referred twice to the Williams robbery. TR 6/11/18, p 214:22-215:3; p 219:21-25; p 220:6-12. In this close case, where the central issue was the identity of the suspect in the surveillance video, there is a reasonable probability that the erroneous admission of the 404(b) evidence "contributed to" Mr. Grant's conviction. This Court should thus reverse. *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009) (defendant entitled to reversal when there is a reasonable probability that the error contributed to his conviction)*; People v. Zapata,* 2016 COA 75M, ¶ 38 (same).

IV. Cumulative error requires reversal

The Due Process clauses of the United States and Colorado Constitutions guarantee the accused the right to a fair trial. *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); U.S. Const. amends V, XIV; Colo. Const. art. II, §25. The right to a fair trial includes the right to an impartial jury that is "free from the influence or

poison of evidence which should never have been admitted…." *Oaks v. People*, 150 Colo. 64, 371 P.2d 443, 445-47 (1962); *see also* U.S. Const. amend. VI, Colo. Const. art. II, §§ 16, 23.

"When reviewing for cumulative error, a court asks whether the identified errors, in combination, deprived the defendant of her constitutional right to a fair trial." *People v. Vialpondo*, 2020 COA 42, ¶ 26. The standard "governs, regardless of whether any error was preserved or unpreserved." *Howard-Walker v. People*, 2019 CO 69, ¶ 26. "The question is not whether the errors were 'brief' or 'fleeting' but whether, viewed in the aggregate, the errors deprived the defendant of a fair trial." *Id*., ¶ 40. Thus, under this standard,

> [R]eversal is warranted when numerous errors in the aggregate show the absence of a fair trial, even if individually the errors were harmless or did not affect the defendant's substantial rights.

Id., ¶ 26.

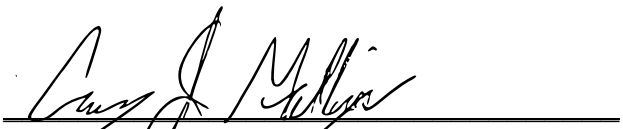
Here, two of the errors—admission of the Williams robbery 404(b) evidence, and admission of the detective's opinion testimony that Grant was the bearded robber in the Full Throttle video—went directly to the central issue in dispute at trial. The late-disclosed inculpatory statement to the Philadelphia police, after the defense had relied throughout pretrial preparation and the first six days of trial on the absence of any statements to the police, compounded the already-

devastating effect of the other errors. In the aggregate, these errors deprived Mr. Grant of his constitutional right to a fair trial. This Court should reverse. U.S. Const., amend. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; *Howard-Walker, supra*; *Vialpando, supra; Oaks, supra*.

Conclusion

For the reasons and authorities stated above and in the Opening Brief, 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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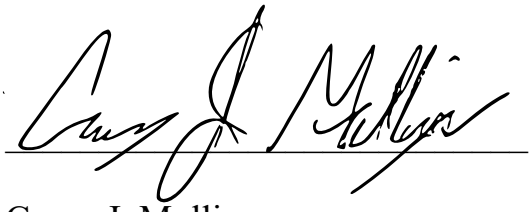
Certificate of Electronic Service

I certify that on the 8th day of July, 2020, this Reply Brief was served on opposing counsel (Senior Assistant Attorney General Majid Yazdi) through Colorado Courts E-Filing per defense request.



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