

ORIGINAL
COURT OF APPEALS
STATE OF COLORADO

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<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>COURT OF APPEALS STATE OF COLORADO</p> <p>▲ COURT USE ONLY ▲</p>
<p>Denver District Court Honorable Martin F. Egelhoff, Judge Case No. 06CR10408</p>	<p>Case No.: 07CA858</p>
<p>THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. MARTIN VILLANUEVA, Defendant-Appellant.</p>	<p>ANSWER BRIEF</p>
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STATEMENT OF THE CASE

Defendant, Martin Villanueva, was charged by information with one count of first degree murder¹ for the shooting death of Benjamin Garcia-Diaz. (v. 1, p. 1). Following a jury trial, defendant was convicted as charged. (v. 2, p. 336). On March 22, 2007, he was sentenced to a term of life in the Department of Corrections, without the possibility of parole. (Id., p. 339). This appeal followed.

STATEMENT OF FACTS

Mario Rivera witnessed the murder. He testified that, on March 26, 2005, he was at the La Sierra nightclub with the victim and another man named Sergio Gonzalez (nicknamed "Guero"). (v. 16, p. 42, 319). Around 10:00 p.m., defendant and defendant's brother Ignacio Villanueva joined Rivera and the victim at La Sierra. (Id., p. 320). Later in the evening, Guero, Rivera, Ignacio, defendant, and the victim went to another bar called Las Tres Potrancas, where they stayed until 1:30 or 2:00 a.m. (v. 16, p. 56, 58). Guero then went home because he was "too drunk." (Id., p. 60).

Rivera testified that around 1:30 a.m., he, the victim, defendant and defendant's brother drove three separate vehicles to a nearby 7-11 gas

¹ § 18-3-102(1)(a), C.R.S. (2008); F-1

station/convenience store. (v. 10, p. 11). The victim was driving his white Ford Expedition, defendant and his brother were in a Buick SUV, and Rivera was driving a friend's Honda. (v. 10, p. 6). Rivera testified that the victim went inside the 7-11 to pre-pay for gas for his Expedition and for Rivera's Honda. (Id., p. 14). Rivera said that after police told people to leave the 7-11 parking lot, they each drove their vehicles a few blocks away and parked on the street.² (Id., p. 15). Rivera testified that nobody was out on the street where they parked. (Id., p. 24).

Rivera said that the victim was sitting in his parked Expedition with his windows down. (Id., p. 26). Rivera testified that he parked across the street from the victim and walked over to the passenger-side window to ask the victim for a cigarette. (Id.). Rivera heard the victim say that he wanted to go home. (Id., p. 27). Rivera saw defendant go into a nearby property with a chain-link fence. (Id., p. 28). Rivera thought defendant used a key to get into the fenced area. (Id., p. 29).

Rivera saw defendant walk up to the driver's side of the victim's car, while holding a black compact disc (CD) case. (Id., p. 31). Rivera testified that defendant rested the CD case on the driver's side door. (Id., p. 32). Rivera heard

² Although Rivera did not know this at the time, the vehicles were parked outside of defendant's home. (v. 10, p. 25-26, v. 16, 108-109).

defendant say, "What's going on?" and the victim answered, "I want to go home." (Id., p. 33). Defendant then said, "No, you're coming with us" and the victim said, "No, I'm going home." (Id.).

Rivera testified that he saw the CD case come down and saw a gun come up. He said that defendant pointed the gun at the victim's head and said, "you're going to come with us." (Id., p. 34). The victim repeated, "No I'm going to go home" and brushed aside the gun. (Id.). The victim said to defendant, "Don't play, don't play." Defendant repeated, "You're going to come with us" and then shot the victim in the head at close range. (Id.).

Immediately after the shooting, Rivera got in his car and drove away. (Id., p. 41). He testified that, as he drove off, he saw defendant waving him back, calling him. (Id., p. 42). Rivera testified that he had met defendant about five times before that night, and had spoken with defendant maybe one time. He explained that he "didn't want to know [defendant]." (v. 16, p. 312-313).

The prosecution's theory of the case was that defendant killed the victim over a \$30,000 drug debt. A few months before the murder, police responded to the victim's house to investigate a domestic disturbance. (v. 10, p. 191-194). Over 1,400 grams of cocaine were seized from the victim's home. (Id., p. 216-217). The victim told several witnesses that the seized drugs belonged to defendant. (v.

10, p. 59, 265; v. 11, p. 79). Juan Garcia, the victim's brother, heard defendant threaten to kill the victim because of the missing drugs on two separate occasions. (v. 10, p. 244, 268-269, 271-272). The victim also mentioned these threats to Ilda Garcia, and told Mary Garcia that he feared for his family. (v. 11, p. 63-64, 79).

The day after the shooting, the victim's Expedition was found burning in a Weld County field. (v. 16. p. 173). A Denver fire investigator concluded that the fire was caused by a human being using an accelerant, that the fire was very hot and intense, and that the fire originated inside of the vehicle. (Id., p. 230-240). Six months later, the victim's remains were discovered in Weld County by a hunter. (Id., p. 199-201, 223).

STATEMENT OF THE ISSUES PRESENTED

- I. **Did the court violate defendant's right to confrontation by limiting cross-examination of a prosecution witness?**
- II. **Did the court abuse its discretion by improperly admitting the deceased's hearsay statements?**
- III. **Did the court abuse its discretion by improperly admitting evidence of other acts under CRE 404(b)?**
- IV. **Does cumulative error require reversal?**

SUMMARY OF THE ARGUMENT

The court did not violate defendant's right to confrontation by limiting cross-examination of a prosecution witness where the evidence was of marginal relevance, was "extraordinarily prejudicial," had a "substantial tendency... to mislead the jury," and did not tend to establish the witness' bias, prejudice, or motive for testifying against the defendant. No abuse of discretion occurred, and any error was harmless.

The court did not abuse its discretion by admitting, under CRE 807, the victim's hearsay statements regarding: (1) his prior drug dealing with defendant, (2) that he owed defendant \$30,000 for drugs seized by police, and (3) defendant's multiple threats to kill the victim and the victim's family. Each of the statements

was relevant to defendant's motive, knowledge, and identity, and possessed circumstantial guarantees of trustworthiness.

The court did not abuse its discretion by admitting, under CRE 404(b), evidence regarding the victim and defendant's drug dealing enterprise and defendant's numerous threats to kill the victim. The evidence was highly relevant and was not unfairly prejudicial.

Defendant has not established cumulative errors sufficient to warrant reversal of his conviction.

ARGUMENT

- I. **The court did not violate defendant's right to confrontation by limiting cross-examination of a prosecution witness where the evidence was of marginal relevance and did not tend to establish the witness' bias, prejudice or motive for testifying against defendant.**

- A. **Standard of review**

Confrontation Clause claims are reviewed *de novo*. Bernal v. People, 44 P.3d 184, 198 (Colo. 2002). The standard applied to preserved Confrontation Clause violations is whether the error is harmless beyond a reasonable doubt. This is not an analysis of whether a guilty verdict would have been rendered in a trial without the error, but what effect the error had on this verdict. Raile v. People, 148 P.3d 126, 133 (Colo. 2006).

B. Defendant's claim

Defendant claims that the trial court infringed upon his right to confrontation by refusing to allow him to impeach Mario Rivera with Rivera's out-of-court statements that contradicted Rivera's trial testimony regarding his ownership and familiarity with guns. (Opening brief, p. 16).

During Rivera's direct testimony, the prosecutor asked Rivera if he had "[a]ny idea what kind of gun" defendant used. (v. 10, p. 34). Rivera answered, "From me knowing guns, no, I can't tell you what kind of gun it was, but it was a big gun." (Id.). Later, the following exchange occurred:

Prosecutor: What kind of gun was it? You said you don't know the caliber, you thought it was big?

Witness: Yeah.

Prosecutor: Do you know what color?

Witness: It was a dark silver, dark metallic color.

Prosecutor: Was it a revolver?

Witness: No, it was an automatic.

(Id., p. 39-40).

During cross-examination, defense counsel pursued the following line of inquiry:

Counsel: And you also told Detective Wilson what kind of gun it was, did you not?

Witness: Yes.

Counsel: Told him it was a 9 millimeter?

Witness: Yes.

Counsel: And you've told this jury today that you don't know what kind of gun it was, only that it was big?

Witness: Yes.

(Id., p. 71). A few minutes later, this exchange occurred:

Counsel: Let me ask you something, sir, you said it was a big gun, you can't tell us what it is?

Witness: Yes.

Counsel: Do you have any working knowledge of 9 millimeters?

Witness: No, I don't.

Counsel: Have you owned a gun?

Witness: No, I don't.

Counsel: Did you shoot a 9 millimeter gun?

Witness: Yes.

Counsel: Who did it belong to?

Witness: My friends.

Counsel: And was that on a single occasion?

Witness: I think it was a couple times.

Counsel: But you yourself never owned a gun?

Witness: No, never.

Counsel: Do you know the difference between a 9 millimeter and revolver?

Witness: Yes.

Counsel: How so?

Witness: The revolver, the other one is from clips, and the revolvers are rounded.

Witness: The barrel has pins?

Counsel: The barrel has pins.

Counsel: Did you get that from TV?

Witness: No, I just seen. Yeah, pretty much.

Counsel: Have you ever owned a revolver?

Witness: No.

Counsel: Never owned a gun of any type?

Witness: No.

Counsel: Never had a gun of any type, I gather?

Witness: I've shot guns, but never owned.

Counsel: Never had one that was yours?

Witness: No.

Counsel: Now, have you ever worried about having your fingerprints on guns?

Witness: No.

Counsel: Have you ever talked to anybody about having your fingerprints on guns?

Witness: No.

Counsel: This 9 millimeter, did it have a banana clip?

Witness: Yes.

Counsel: And so you know what a banana clip is?

Witness: Yes.

Counsel: And have you ever worked on guns?

Witness: No. I don't know.

Counsel: Ever taken a 9 millimeter apart?

Witness: No.

Counsel: Ever changed barrels, anything like that?

Witness: No.

(Id., p. 82-84).

Counsel then asked to approach the bench, and informed the court that he intended to cross-examine Rivera about six separate recorded conversations Rivera had with a man named "Neo," a year and a half after the murder. (Id., p. 85).

Defense counsel said that the statements were inconsistent with Rivera's testimony regarding his "knowledge of guns, his ownership of guns, et cetera." (Id., p. 86).

The prosecutor objected on relevancy grounds. (Id.). The court took a recess to allow the prosecution to review the recorded conversations. (Id., p. 88).

After the break, the parties discussed the matter at length in chambers. (Id., p. 89-106, 109-114). Defense counsel specified that the statements he wanted to address on cross-examination involved Rivera's "ownership and control over various weapons, one of them being one with a banana clip with a 30-round clip," statements about wiping down a gun to remove fingerprints, and a discussion about changing the barrels of a weapon to change the grooves left in the bullets. (Id., p. 92). Counsel argued,

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.

(Id., p. 92-93). The proffered statements were read into the record. (Id., p. 95-96, 98-100). A copy of the relevant portion of the transcript is attached to defendant's Opening Brief.

After hearing the substance of the proffered statements, the prosecutor renewed her relevancy objection, and argued that the statements were also "overwhelmingly prejudicial." (Id., p. 101).

The trial court first recognized that the law provides for "wide latitude with respect to impeaching or challenging the credibility of witnesses" and that "this particular witness is the crucial witness here." (Id., p. 102). The court then listed its concerns: (1) none of the statements actually impeached Rivera's testimony that he did not know what kind of gun defendant used to shoot the victim; (2) Rivera discussed the difference between a revolver and a 9 millimeter semiautomatic, and thus did not deny "all knowledge of gun[s]"; (3) the statements do not impeach Rivera's testimony that he did not own a gun, but had fired guns owned by his friends; and (4) the statements are "extraordinarily prejudicial." (Id., p. 102-103).

The court elaborated on the matter of unfair prejudice:

[The statements] are highly prejudicial in the sense that they deal with other transactions that may or may not have occurred involving other acts which may not have occurred.

They have a substantial tendency, I think, to mislead the jury, to lead them down the wrong path, to distract them from the issues in this case, and is marginal, at best, that this value has to impeaching the limited testimony we're talking about, is substantially outweighed by the unfair prejudice and confusion of the issues.

(Id., p. 103). The court declined to admit the evidence. (Id.). After further argument, the court affirmed its ruling that "the marginal relevance is outweighed by the substantial prejudice." (Id., p. 110-114).

C. Law and argument

"The trial court has discretion to determine the scope and limits of cross-examination, and, absent an abuse of discretion, the court's rulings will not be disturbed on appeal." People v. Rodriguez, 914 P.2d 230, 267 (Colo. 1996).

Under the Rules of Evidence, cross-examination generally "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." CRE 611(b). Even relevant cross-examination on proper topics may be limited "if its probative value is substantially outweighed by other considerations such as unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless

presentation of cumulative evidence.” CRE 403; *see Vega v. People*, 893 P.2d 107, 118 (Colo. 1995); *Merritt v. People*, 842 P.2d 162, 166 (Colo. 1992).

Thus, for example, cross-examination which places undue emphasis on collateral matters is properly limited to prevent the “sideshow” from taking over the “circus.” *See People v. Cole*, 654 P.2d 830 (Colo. 1982); *People v. Taylor*, 545 P.2d 703, 706 (Colo. 1976).

Where, as here, the defendant claims that the trial court’s limitation of his cross-examination also violated his constitutional right to confrontation, similar principles govern the analysis of the constitutional claim. *See Vega v. People*; *Merritt v. People*.

The Confrontation Clause of the United States Constitution guarantees to a criminal defendant the right to an opportunity to cross-examine witnesses testifying for the prosecution. U.S. Const. amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Vega*, 893 P.2d at 118; (Colo. 1995); *Merritt*, 842 P.2d at 165. “[I]t is constitutional error to limit excessively a defendant’s cross-examination of a witness regarding the witness’ credibility, especially cross-examination concerning the witness’ bias, prejudice, or motive for testifying.” *Vega*, 893 P.2d at 118; *Merritt*, 842 P.2d at 167.

However, the constitutional right to cross-examine “is not absolute,” People v. Cole, 654 P.2d at 833, and it “does not mean unlimited cross-examination.” Merritt, 842 P.2d at 166. “The scope and duration of cross-examination is under the control of the trial court subject to well-established rules,” including those embodied in the Rules of Evidence. Id.

“Thus, a trial court has wide latitude, insofar as the Confrontation Clause is concerned, to place reasonable limits on cross-examination based on concerns about, for example, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation which is repetitive or only marginally relevant.” Id.; Delaware v. Van Arsdall, 475 U.S. at 679.

Here, the issue of whether the eyewitness to the murder owned a gun and was familiar with guns was only marginally relevant. This is especially true in light of defendant's asserted defense – that he did not commit the crime and that, “nothing out of the ordinary occurred [at the alleged crime scene] on March 27, 2005.” (v. II, p. 332).

Additionally, while the statements somewhat contradicted Rivera's trial testimony about his ownership of and familiarity with guns, the evidence did not tend to establish Rivera's bias, prejudice or motive for testifying against defendant.

Thus, the trial court's ruling prohibiting inquiry into this collateral subject matter was not an abuse of discretion.

Alternatively, any error was harmless beyond a reasonable doubt in light of the facts of the case. No weapon was ever found in connection with the murder. It was undisputed that the victim died from a gunshot wound to the head. Rivera's experience owning, shooting, cleaning, or discussing guns would have had nothing whatsoever to do with the questions for the jury to decide.

Rivera's credibility as an eyewitness would not have been undermined by evidence that he knew more than he claimed to know about some guns or by evidence that he may have owned a gun – an inference from a statement about lending a gun to "Neo." The probative value of the alleged impeachment evidence was far from compelling. It is highly unlikely that this evidence would have cast serious doubt on Rivera's testimony about the murder he witnessed. Accordingly, reversal is unwarranted.

II. The court did not abuse its discretion by improperly admitting the deceased's hearsay statements.

A. Standard of review

As a preliminary matter, the substance of this claim is unclear from the Opening Brief. The heading refers only to a claim that the trial court abused its

discretion by admitting the deceased's hearsay statements. (Opening brief, p. 10). However, under the heading "Preservation of issue and standard of review" defendant cites People v. Gash, 165 P.3d 779 (Colo. App. 2006), and United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004), and refers to the "confrontation clause" and "confrontation rights" without specifying whether his claim is grounded in the federal or state constitution. (Opening brief, p. 19-20). Similarly, in the concluding paragraph, defendant asserts that admission of the hearsay statements "violated [his] constitutional right to confront." (Id., p. 28).

Defendant's reference to "firmly-rooted" hearsay exceptions and "guarantees of trustworthiness" further suggests that he is attempting to raise a confrontation clause claim. Under Ohio v. Roberts, 448 U.S. 56 (1980), and People v. Dement, 661 P.2d 675 (Colo. 1983), hearsay is admissible if the declarant is unavailable to testify and the statement bears sufficient "indicia of reliability." Roberts, 448 U.S. at 66; Dement, 661 P.2d at 680-81. Reliability can be inferred without more when the hearsay falls within a firmly rooted hearsay exception. Roberts, 448 U.S. at 66; Dement, 661 P.2d at 681. In the absence of a "firmly rooted" exception, the proponent of the evidence must demonstrate particularized guarantees of trustworthiness. Roberts, 448 U.S. at 66.

Because the statements at issue involve casual remarks made to acquaintances, they are non-testimonial. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.") Non-testimonial hearsay is not subject to exclusion under the federal confrontation clause and is properly analyzed for admissibility under the rules of evidence. *Raile v. People*, 148 P.3d 126, 130 (Colo. 2006) *citing Davis v. Washington*, 547 U.S. 813 (2006).

At a minimum, neither a state nor a federal confrontation clause claim was preserved. The word "confrontation" does not appear in the portion of the transcript cited by defendant. (v. 4, p. 18-28). Further, defendant cited no law in the body of his argument to support either a state or federal confrontation clause claim. *See People v. Diefenderfer*, 784 P.2d 741, 752 (Colo. 1989) (if a defendant does not support his appellate arguments by citation to authority, an appellate court need not address them); C.A.R. 28 (a)(4) ("The arguments shall contain ... citation to the authorities ... relied on"). Thus, this court should decline to review any purported confrontation clause claims.

Accordingly, the only issue properly preserved and argued on appeal is the trial court's exercise of discretion in admitting the deceased's hearsay statements.

Trial courts have a considerable measure of discretion in applying the residual exception to the hearsay rule. People v. Fuller, 788 P.2d 741, 744 (Colo. 1990). A trial court abuses its discretion only when its ruling is manifestly arbitrary, unreasonable, or unfair. People v. Stewart, 55 P.3d 107, 122 (Colo. 2002). If an abuse of discretion is shown, the improper admission of hearsay is subject to a harmless error analysis. People v. Fry, 92 P.3d 970, 980 (Colo. 2004).

B. Facts, law, and argument

1. Claims lack specificity

In this subsection of the Opening Brief, defendant does not provide a single record cite pinpointing where in the **trial transcript** any of the statements of which he complains were admitted.³ (Opening brief, p. 20-28). An appellate court can decline to rule on claims that are not supported by references to the record or by legal authority. White v. District Court, 695 P.2d 1133 (Colo. 1984). It is the task of counsel to set forth the specific errors, the grounds and supporting facts and authorities therefor. Courts will not search through the record and the briefs to articulate the claims for the parties. Mauldin v. Lowery, 255 P.2d 976 (1953); Westrac, Inc. v. Walker Filed, 812 P.2d 714 (Colo. App. 1991). This court should

³ Instead, defendant cites to the People's motion to admit the hearsay statements and the pretrial hearing at which the parties litigated that motion.