

CERTIFICATION OF WORD COUNT: 7,030

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Colorado State Judicial Building 2 East Fourteenth Avenue, Suite 300 Denver, Colorado 80203</p>	<p>2007 03 14 P 3:15</p> <p>▲ COURT USE ONLY ▲</p>
<p>Appeal from the District Court, City and County of Denver, Colorado Honorable Martin F. Egelhoff, District Judge Case No. 06 CR 10408, Courtroom 11</p>	<p>Case No.: 2007CA858</p>
<p>Plaintiff-Appellee:</p> <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Defendant-Appellant:</p> <p>MARTIN VILLANUEVA</p>	<p>OPENING BRIEF</p>

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I. Statement of the issues

1. The trial court denied Villanueva's right to confront by refusing to allow defense counsel to impeach the prosecution's key witness with prior statements that were inconsistent with his trial testimony.
2. The trial court abused its discretion in admitting hearsay statements of the victim at trial, as those statements were not admissible under any hearsay exception.
3. The trial court abused its discretion in admitting inflammatory, prejudicial evidence under CRE 404(b).
4. The cumulative effect of the trial court's errors violated Villanueva's right to a fair trial and warrants a new trial.

II. Statement of the case

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

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

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

B. Statement of the Facts

It is undisputed that on the evening of March 26, 2005, Garcia, Villanueva, Villanueva's brother Ignacio (nicknamed "Nacho"), Sergio Gonzales (nicknamed "Guerro"), and Mario Rivera went to La Sierra, a bar in Aurora. Later in the evening, all five went to Las Tres Potrancas, a bar in Denver. 16 R. at 26:1-6, 42:18-20, 56:18-24, 314:10-12, 316:11-17, 319:8-12, 320:4-7; 10 R. at 7:3-20, 11:14-25.¹

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

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

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

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

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

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

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

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

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

100:10-16, 109:18-23, 119:3-25, 126:1-2, 128:13-19.² Laurie Vargas testified that she heard a loud noise, but it was like “the trains hit too hard or a circuit or something.” 14 R. at 16:10-25. She said it was not like a gunshot. *Id.* at 20:8-14. She also testified that the noise she heard was not on Easter Sunday, but instead early the following morning (March 28). *Id.* at 21:11-22:7. No one heard cars squealing or anything unusual. 12 R. at 169:4-16. No witnesses other than Rivera place Garcia at the Jason Street location. No witnesses other than Rivera place Garcia and Villanueva together after the 7-11.

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

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

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

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

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

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

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

III. Summary of the Argument

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

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

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

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

IV. Argument

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

1. Preservation of issue and standard of review

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

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

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

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

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

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

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

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

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

A. No, I don't.

Q. Have you owned a gun?

A. No, I don't.

Q. Did you shoot a 9 millimeter gun?

A. Yes.

Q. Who did it belong to?

A. My friends.

Q. And was that on a single occasion?

A. I think it was a couple of times.

Q. But you yourself never owned a gun?

A. No, never.

.....

Q. Have you ever owned a revolver?

A. No.

Q. Never owned a gun of any type?

A. No.

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

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

Q. Never had one that was yours?

A. No.

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

A. No.

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

A. No.

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

A. Yes.

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

A. Yes.

Q. And have you ever worked on guns?

A. No, I don't know.

Q. Ever taken a 9 millimeter apart?

A. No.

Q. Ever changed barrels, anything like that?

A. No.

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

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

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

After giving the prosecution the chance to review transcripts of the statements, a discussion ensued during which the court asked defense counsel what it was going to do. Counsel indicated he would play a series of clips that talk about Rivera’s ownership and control over weapons, about wiping fingerprints off of weapons, about changing barrels of a weapon, so as not to be caught. 10 R. at 92:14-24, App. 4. Counsel noted that the testimony went to Rivera’s credibility, and said “what I did before the break was laid [sic] the foundation to then ask whether or not [Rivera] had these conversations, did [he] affirm that [he] had this weapon, that [he] lent it Neo, that [he] took it back, things like that. If he denied the conversation, it would be my position and intention to play the tape where we have the two of them.” 10 R. at 93:5-11, App. 5.³ (Attached to this brief are the

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

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

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

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

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

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

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

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

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

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

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

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

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

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