COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Boulder District Court Honorable Thomas F. Mulvahill Case Number 12CR222	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. MICHAEL CLARK Defendant-Appellant	▲ COURT USE ONLY ▲
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MICHAEL CLARK'S SECOND AMENDED OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with this Court's order dated April 2, 2015. Specifically, the undersigned certifies that:

This brief contains 16,991 words.

This brief complies with C.A.R. 28(k) because:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

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.

Signature of attorney or party

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CASE STATEMENT

This was a cold case investigation into Marty Grisham's murder in Boulder on November 1, 1994. No one witnessed the shooting and the murder weapon was never found.

In 1994, 19-year-old Michael Clark was investigated. Clark was a friend of Grisham's daughter, Kristen ("KG"), a suspect, as was KG's brother, Loren ("LG"). (P.Ex.59,15:55-16:15,1:52:15-1:55:50; CF,p13; 10/10/12(p.m.)(part.two),p472-73; 10/11/12,p603-04; 10/15/12,p768-71; 10/17/12(p.m.),p2003)[1]

On November 3, 1994, police interrogated Clark and repeatedly accused him of murdering Grisham. (P.Ex.59) Clark maintained his innocence. (*Id.*)

Police discontinued investigation in October 1995. (CF,p25; 10/17/12,p1205,1211) The case remained inactive until assigned to Detective Heidel, of Boulder's cold case unit, in 2009. (10/17/12,p1177,1205)

[1] Transcript cites are to date and PDF page. "CF" cites are to the Court File.

In April 2011, Clark was 36, married with three kids, a law-abiding citizen working at Ace Hardware in Silverthorne. (10/17/12,p1167,1210; P.Ex.4(Mots.CD),23:25-35) He had not spoken with police since 1994. (10/17/12,p1211)

On April 15, 2011, however, two federal agents surprised Clark at work and interrogated him, ostensibly about illegal gun-trafficking. (P.Ex.4(Mots.CD)) Clark voluntarily participated in a second interview on April 20, 2011. (10/17/12, p1168-69; P.Ex.6(Mots.CD))[2]

In this second interview, agents confronted Clark with Grisham's murder, lying to him about new forensic science that could prove he was the murderer. (10/17/12,p1174) Clark maintained his innocence. (P.Ex.6(Mots.CD))

After an hour, Heidel arrived and pointedly accused Clark of murdering Grisham. (10/17/12,p1173; 8/9/12,p1502; P.Ex.6(Mots.CD)) Clark maintained his innocence. (P.Ex.6(Mots.CD))

Reopening the investigation, solely focused on Clark, failed to yield a murder weapon, eyewitness, or confession. Nonetheless, on January 5, 2012, an arrest warrant issued. (CF,p12-31) On January 11, 2012, Clark was charged with first-degree murder-after deliberation.[3] (CF,p51-52)

[2] The prosecution did not introduce the April 20 interrogation at trial.
[3] §18-3-102(1)(a),C.R.S.

Trial lasted nine days. Witnesses had substantial difficulties recalling events and statements made 17-18 years earlier. Many stated their only recollections resulted from reviewing transcripts. (*E.g.*,10/15/12,p817-32) The prosecution made extensive use of witnesses' prior unsworn, out-of-court statements to refresh and impeach testimony. (Supp.Access,p548(jury.inst.12); *e.g.*,10/10/12,p407,418-19; 10/15/12,p816-46,870-74,879,881; 10/17/12,p1290-94)

On October 22, 2012, after three days deliberating, jurors found Clark guilty. (10/22/12,p1535-36) He was sentenced to life in prison without parole. (*Id.*,p1538)

Clark timely noticed this appeal on December 10, 2012.

FACTS

Clark is a devoted husband of 12 years and the father of three children, ages 6, 8, and 10. (*See* 10/17/12,p1167,1210; P.Ex.4(Mots.CD),23:25-35) He went through rough times after high school, losing financial aid for college and depending on friends for housing. (P.Ex.81,2:20-:30,9:10-10:05; P.Ex.59,1:06:50-1:07:10) He did dumb things, including forging Grisham's checks. (P.Ex.81; P.Ex.59,4:05-7:30; P.Ex.59,6:00-6:10)

Clark, however, stayed in Boulder, successfully completed probation for the forgery, and put that time behind him. (P.Ex.81,6:10-:30; 10/17/12,p1208-10) In

2001, he moved to Oregon for nine years. (10/17/12,p1209-10) In 2010, he and his family moved back to Colorado. (*Id.*) He has always maintained his innocence.

On November 1, 1994, 19-year-old Clark, couch-surfing in Gunbarrel after losing financial aid, went to a soccer match in Lakewood with Jamie Uhlir. (P.Ex.59,1:03-1:07; P.Ex.81,9:30-10:00; 10/15/12,p821-24,841-45) The game started around 7p.m. and ended around 8:30-8:45p.m. (P.Ex.59,1:03-1:07; 10/15/12,p821-24,841-45)

Uhlir and Clark left as late as 8:45p.m. (*Id.*) Uhlir was on crutches, so they took their time. (10/15/12,p821-24,841-45) Clark drove Uhlir back to his apartment near DU. (*Id.*) It took 15-20 minutes, perhaps longer. (*Id.*,p840)

Per Uhlir's review of 1994 statements, Clark left between 8:50-9:00p.m., saying he had something to do. (*Id.*,p824-26) Uhlir testified this was "pretty typical of Mike," because, "if he was doing something, whether it was meeting a girl or something else, he would never really get into the minute details about it." (*Id.*)

Clark was not in a hurry or acting nervous or weird. (*Id.*,p844-45) Uhlir saw Clark the next day and he seemed completely normal. (*Id.*,p846-47) The drive from Uhlir's to Boulder back then took "anywhere from 20, 25 to probably 45, 50 minutes depending on traffic." (*Id.*,p825)[4]

[4] The prosecution presented no evidence of November 1, 1994 traffic conditions.

Clark later explained to police he was paged by Allison Hackman and went home to call her. (P.Ex.59,1:04:05-30) Hackman visited Clark when he was jailed for forgery and they dated afterwards. (10/16/12,p1829-30,1841-42)

Clark told police he drove to Gunbarrel, watched the end of "Beavis and Butthead," which aired between 9-9:30p.m., and talked to Hackman until 10:15p.m. (P.Ex.59,1:04:45-1:05:15; D.Ex.N) Clark then briefly talked to Kristin Baulsir. (P.Ex.59,1:05:15-:30)

Hackman told police Clark called at 9:45-10:00p.m. (10/16/12,p1838-45) She told one officer she was positive it was 9:45. (*Id.*)[5]

Hackman said Clark sounded calm and there was nothing unusual about him such as breathlessness or nervousness. (*Id.*) Baulsir testified police never contacted her until December 2009 and she could not recall anything. (*Id.*,p1851-54)

Grisham and his new girlfriend, Barbara Burger, were supposed to have dinner with KG that night, but KG blew it off. (10/10/12(p.m.(part.one)),p1650; 10/11/12,p583) Burger was finalizing her divorce from another man and Grisham was her first new boyfriend. (10/10/12(p.m.(part.two)),p425)

KG left a voicemail on Grisham's home phone at 4p.m., when Grisham would be at work, which surprised him. (10/10/12(p.m.(part.one)),p1658) Grisham "was

[5] Hackman's mother thought she told police in 1994 the call came at 9:45p.m., but she could not remember. (10/17/12,p1292-94)

concerned that something was going on [with KG] that he didn't know about and just wondered what it was…." (*Id.*)

Around 9:30p.m., during dinner with Burger, Grisham responded to a knock at the door. (10/10/12(p.m.)(part.two)),p407) Grisham said, "That sounds like a Loren knock." (*Id.*,410) In Burger's recounting, Grisham looked through the peephole, paused, looked at her, opened the door, and was shot multiple times. (*Id.*,p407-11) At 9:34p.m., Burger called 911. (*Id.*,p408,452)

Around 9:45p.m., police went to Louisville to notify KG and Grisham's ex-wife, Pam ("PG") of Grisham's death. (10/11/12,p613-15,617-18,647) Upon learning of Grisham's murder, KG laughed nervously and said: "He could be a jerk, but not that big of a jerk." (*Id.*,p589-90,602,648) KG then called someone staying at the house, telling her "you will never believe what happened," and laughing. (*Id.*,p591,620)

KG had a very difficult relationship with Grisham. (*Id.*,p560) He was "horrible," "emotionally abusive," and "authoritarian" to her, LG, and PG. (*Id.*,p560-61,601-02) The divorce was not amicable – PG did not want anything to do with Grisham. (10/11/12,p541,551-52)

KG's relationship with Grisham in 1994 "wasn't great, but [they] basically just didn't see much of each other." (*Id.*,p561) In August 2011, KG told police she thought Grisham had finally taken it too far and pissed somebody off. (*Id.*,p603)

Grisham told Burger he was an "asshole" to his kids. (10/10/12(p.m.)(part.two)),p434) Grisham was especially tough on LG and they did not get along. (10/11/12,p540,553-54) LG stole from Grisham multiple times.[6] (*Id.*,p540)

While there were no eyewitnesses, one resident, Tanya Jerome, walked past an unusually strange, scary man in the apartment complex between 9:15-9:30p.m. (10/17/12(p.m.),p1932,1947) Jerome said it was very unusual – it was the only time in Boulder she had been scared of someone. (*Id.*) It was quiet outside, but the man "set off [her] radar" when he came too close, walking fast. (*Id.*,p1934,1948)

Jerome learned about the murder the next day and assisted police with a sketch. (*Id.*,p1936-38,1945; D.Ex.R) The sketch did not resemble Clark. (D.Ex.R.; P.Ex.44; 10/17/12(p.m.),p1956-57)

Jerome examined a lineup including Clark's photo. (10/17/12(p.m.),p1938-41,1989-92; D.Ex.Q) She did not recognize anyone and said Clark was definitely not

[6] LG committed suicide in 2007. (10/11/12,p539)

the man she saw. (10/17/12(p.m.),p1940-42) Jerome lived there another eight months, but never saw the person again.[7] (*Id.*,p1945)

Clark was investigated because he knew KG and admitted to forging Grisham's checks during the previous month. (P.Ex.59,4:05-7:30) Clark took care of Grisham's cat for KG the last weekend of September 1994, when he stole and subsequently wrote checks to himself. (*Id.*,1:38:55-1:39:40; 10/11/12,p573) He used the funds for costs related to his arrest on a stolen motorcycle with KG onboard. (P.Ex.59,17:40-18:00,1:45:15-30) At trial, the prosecution argued the case began with this motorcycle incident six weeks earlier, allegedly setting Clark on the path to murder. (10/10/12(p.m.),p1604; 10/18/12,p2044)

Also, a jailhouse snitch, cocaine addict, probation violator, and six-time felon named Walter Stackhouse claimed Clark made admissions, including nodding his head when Stackhouse asked if Clark killed someone, while Clark was jailed for forgery. (10/16/12,p1109-22,1135-40; 10/16/12(p.m.),p1785-92) Stackhouse's priors included false information to a police officer, fraud, forgery, and false reporting. (10/16/12,p1135-40; 10/16/12(p.m.),p1785-92) He admitted that in exchange for information he requested work release. (10/16/12,p1123; 10/16/12(p.m.),p1788-93)

[7] It may have been Mark Zondlo, a resident who resembled the sketch. (10/17/12(p.m.),p1979-84) Zondlo, however, arrived home after the shooting, well after 9:15-9:30p.m. when Jerome saw the scary man. (*Id.*,p1932,1947,1981-82) No other candidate emerged as the man Jerome saw and the police never considered Zondlo a suspect. (CF,p16; 10/17/12,p1983-84)

Police talked with a Marine recruiter, Sergeant Weyer, who said Clark showed him a 9mm handgun sometime before the murder. (10/15/12,p870-72) Clark admitted to possessing a handgun, but said he got rid of it before Grisham's death. (P.Ex.59)

Police interrogated Dion Moore, a multiple-time felon, drug user, and interstate gun trafficker. (10/15/12,p906-12,957-59) Moore, who in 1995 negotiated a deal to testify against Clark in exchange for dismissal of pending cases, said he procured two 9mm Bryco-Jennings handguns, one for himself and one for Clark, in October 1994. (*Id.*,p920-32,947-49,955-58; D.Ex.A)

Both Moore and Stackhouse were released from incarceration in other states to testify. (10/15/12,p906-07,938-42; 10/16/12,p1109) There is no indication in the record, including the 20-page warrant for Clark's arrest, that Moore was investigated, despite keeping one of two Bryco-Jennings 9mm handguns for himself.[8]

The police thoroughly investigated Clark, including fruitless, consensual searches of his person, the Gunbarrel house, and Clark's car and a lengthy, confrontational stationhouse interrogation. (10/11/12,p720,734; P.Ex.59) Police had Clark participate in a pretextual gunshot residue ("GSR") test. (10/17/12(p.m.),p1995-2003) Officers, knowing they would not test GSR,

[8] Moore claimed he kept the smaller of two guns, which was inconsistent with ballistics evidence. Neither gun was recovered by police, so only Moore's word evidenced which he kept. (10/15/12,p920-22)

emphasized the test's importance and efficacy, hoping Clark would confess. (*Id.*) Clark maintained his innocence. (*Id.*; P.Ex.59)

Officers suggested KG and LG had the strongest motives because they would receive insurance money, KG was not upset, and LG and Grisham had conflicts growing up. (P.Ex.59,1:52:15-1:55:50; *see also* CF,p522, search warrant affidavit listing Grisham's assets allocated to KG, LG, and PG)[9] Clark maintained his innocence and said he knew nothing about it. (*Id.*) All three were investigated, no one was charged.

In December 2009, Heidel reopened the case. (10/17/12,p1180) This time, police focused solely on Clark. (*Id.*,p1208)

In the reopened investigation, a Carmex container found in an inconspicuous spot underneath a stairwell outside Grisham's apartment the morning after the murder was tested for DNA and compared with Clark's. (10/11/12,p688; 10/12/12,p1722-70) The exterior of the Carmex produced DNA which could not be linked to Clark. (*Id.*) The interior produced an inhibited mixed sample, which when compared to Clark's DNA matched 4 of 16 loci, meaning Clark's paternal lineage could not be excluded as the contributor. (*Id.*) The mixed sample, however,

[9] Detective Trujillo volunteered at trial that KG took a polygraph in connection with Grisham's murder. (10/17/12(p.m.),p2003) The search warrant for Clark's DNA confirms KG took a polygraph in 1994, and in the examiner's opinion KG engaged in "purposeful non-cooperation" indicating she wanted "to avoid detection of deception in one or more of the areas under investigation." (CF,p515,521) LG also took a polygraph; the examiner opined LG was not telling the truth when he denied planning with anyone to shoot Grisham. (CF,p522)

contained DNA from at least one other male, and could have contained DNA from two or more other males. (*Id.*,p1761-62)

No other DNA was compared against the Carmex sample. (*Id.*,p1770) Nor was the DNA run through a law enforcement database of known offenders. The sample was tested against a database of only 4,100 people to come up with estimated probability the Y-STR DNA belonged to Clark's paternal lineage. (*Id.*,p1763-65) DNA analysis said nothing about when the Carmex was left in the stairwell, nor when DNA was deposited inside the container.[10] (*Id.*,p1765)

On April 15, 2011, federal agents visited Clark unannounced at work. (P.Ex.81) The agents falsely said they were investigating gun trafficking connected to Moore, Russian organized crime, and Chicago "gangbangers." (*Id.*) They asked Clark to help by locating the gun Moore gave him 17 years earlier. (*Id.*) Clark said he couldn't remember, but guessed he tossed the gun in a dumpster because he got nervous having it. (*Id.*,14:00-15,20:45-21:05)

Law enforcement interrogated Clark again in Frisco. (10/17/12,1168-74) The interrogation was confrontational and interrogators repeatedly accused Clark of murder. (*Id.*) They falsely claimed forensic science could demonstrate Clark's gun from 1994 was the murder weapon. (*Id.*) Clark maintained his innocence.

[10] Even if Clark's DNA was present, Clark was previously at Grisham's apartment to watch the cat and the Carmex was not in an obviously visible spot.

Despite the lack of an eyewitness or murder weapon, Clark would be charged with and convicted of murder. Mr. Clark maintains his innocence.

ARGUMENT SUMMARY

The prosecution's wholly circumstantial evidence was insufficient in quality and quantity to support the conviction. But even assuming, *arguendo*, the evidence was legally sufficient, this circumstantial and vigorously disputed case was exceptionally sensitive to numerous pretrial and trial errors.

Clark, who has always maintained his innocence, argued the DA correctly declined to file charges against him in 1994 and inconsequential evidentiary developments changed nothing 18 years later. (10/18/12,p2070-72) Searches of Clark, the house where he stayed, and his car produced nothing. No one witnessed the shooter. The murder weapon was never found.

Clark hardly knew Grisham, having met him once, years earlier. (P.Ex.81,14:45-15:45) The prosecution's alleged motive – that Clark killed Grisham to avoid detection of the forgery – made no sense.

Clark barely concealed the forgery, writing the checks to himself in handwriting easily distinguishable from Grisham's. (10/12/12,p1716-20; P.Ex.61) When confronted, Clark immediately fessed up. (P.Ex.59,4:05-7:30) Yet the prosecution

argued this same person planned and rapidly carried out a homicide, established an alibi, left insufficient evidence to file charges, and kept the secret for 17 years.

Even, *arguendo*, crediting the prosecution's motive theory with some plausibility leaves gaping holes in the evidence. Clark's whereabouts were known November 1, 1994, and he would have to have met an unreasonably tight timeline, avoided all traffic and hit every green light, to conceivably accomplish the murder, let alone without detection. Meanwhile, a witness saw a scary man, demonstrably not Clark, at the complex just before the murder. The witness lived there, had never seen the scary man before, never saw him again in eight subsequent months, and was never scared by someone in Boulder before or since. (10/17/12(p.m.),p1932,1945,1947) The resident who resembled the police sketch was ruled out as a suspect without investigation.

The prosecution's best evidence came from two career felons, who both negotiated for benefits for their statements. Stackhouse's lengthy rap sheet included fraud and lying to police. (10/16/12,p1123,1135-40; 10/16/12(p.m.),p1785-93) Moore trafficked in illegal guns since turning 16. (10/15/12,p906-12,957-59) He reached a deal in 1995 to dismiss pending cases to testify against Clark. (*Id.*,p947-49,955-58; D.Ex.A) Both men were released from incarceration to testify.

Given this evidence, numerous errors and prosecutorial misconduct reversibly prejudiced Clark.

The court erroneously admitted Clark's involuntary statements from one interrogation (P.Ex.59) and un-*Mirandized* statements from a second custodial interrogation (P.Ex.81), causing reversible prejudice.

The court reversibly erred in admitting, as *res gestae*, evidence of Clark's arrest, six weeks before the murder, for a stolen motorcycle. The incident was irrelevant and inadmissible under any evidentiary theory. Even if, *arguendo*, the evidence possessed scant relevance, the danger of unfair prejudice far outweighed probativity.

The court erred when it prevented Clark from asking a lead detective about interview notes that Stackhouse was a "psychopath" and polygraph candidate. These perceptions were admissible under *Davis* and *Conyac*,*supra*. The ruling excluded evidence that greatly undermined the prosecution's key witness, causing reversible prejudice.

Conversely, the court plainly erred under CRE 608(a), *Wittrein*, and *Liggett*,*supra*, in allowing a lead investigator to testify Clark lied, without contextually limiting that testimony under *Davis*. After precluding Clark's inquiry into the same officer's perceptions of Stackhouse's truthfulness, the court allowed this attack on Clark's, causing reversible prejudice.

The court reversibly erred when it prevented Clark from asking about police investigation of a green car spotted driving away from the crime scene. The evidence was nonhearsay and Clark tendered it for the relevant, necessary purpose of resolving confusion caused by prosecution evidence.

Prosecutors committed repeated, flagrant misconduct during opening statement and rebuttal, reversibly prejudicing Clark.

The court reversibly erred in rejecting Clark's tendered instruction correctly stating deliberating jurors have the right to disagree. The jury was out three days, indicating likely disagreement. Had the jury been correctly instructed, the result likely would have been different.

These numerous errors and prosecutorial misconduct cumulatively prejudiced Clark, requiring reversal.

ARGUMENT

I. The Evidence was Insufficient in Quality and Quantity to Support the Conviction Beyond a Reasonable Doubt.

A. Standard.

Clark moved for judgment of acquittal and subsequently renewed the motion. (10/17/12,p1283; 10/17/12(p.m.),p2028) Sufficiency is addressed de novo. *Dempsey v. People*,117 P.3d 800,807(Colo.2005).

B. Sufficiency Law.

Due process prohibits conviction except by proof beyond a reasonable doubt. U.S. Const. amends. V,XIV; Colo. Const. art.II,§25; *In re Winship*,397 U.S. 358(1970); *Kogan v. People,*756 P.2d 945(Colo.1988). A reviewing court determines whether the evidence as a whole and in a light most favorable to the prosecution is sufficient to support a conclusion by a reasonable factfinder that each essential element has been proven beyond a reasonable doubt. *Jackson v. Virginia*,443 U.S. 307(1979); *Kogan*,950.

"[V]erdicts in criminal cases may not be based on guessing, speculation, or conjecture." *People v. Duncan*,109 P.3d 1044,1046(Colo.App.2004)(citations, quotations omitted). A modicum of relevant evidence will not rationally support a conviction. *Kogan*,950. The prosecution's evidence must be substantial and sufficient in *both* quantity and quality. *Dempsey*,807.

C. Analysis.

The prosecution had to prove beyond a reasonable doubt that Clark, with intent to cause Grisham's death and after deliberation, caused Grisham's death. (Supp.Access,p550(jury.inst.14)); §18-3-102(1)(a),C.R.S.

The DA determined probable cause did not exist, let alone evidence proving guilt beyond a reasonable doubt, for 17 years. Even as tried, there was no confession, no eyewitness, and no murder weapon.

Clark was interrogated repeatedly. He steadfastly maintained his innocence and lack of any information.

The prosecution's case necessarily rested on a house of cards of circumstantial evidence and a theory of Clark's motive defying credulity.

1. The evidence did not establish Clark was at the scene.

The prosecution had to put Clark at the scene; it offered Stackhouse's recollections from being jailed with Clark:

> I asked him did you kill somebody. He just wouldn't say anything, you know. He kind of just nodded his head yes. I said well, did you. And he said the guy's dead. And then he kind of just hushed up after that….

(10/16/12,p1115) Stackhouse testified Clark told him about the motorcycle incident and a police sketch that did not look like him, Clark grabbed newspapers in jail before other inmates saw them, and that Clark got rid of the gun. (*Id.*,p1118-21,1126) Stackhouse bolstered his statements, claiming he had never testified, feared what would happen if California inmates knew he testified, and felt morally obligated to testify. (10/16/12(p.m.),p1122-23,1810)

Stackhouse's claims must be considered legally incredible. They existed in 1994 and were insufficient to justify charges.

The reasons why are apparent from trial. First, there is the thin ice of the supposed head nod, an ambiguous supposed admission if ever one existed.

Second, Stackhouse possessed zero loyalty to the truth and strong motives to lie. Stackhouse was a cocaine addict, probation violator, and six-time felon. (10/16/12,p1109-22,1135-40; 10/16/12(p.m.),p1785-92) His crimes included false information to a police officer, false imprisonment, criminal threat, theft, possession of a Schedule I-II controlled substance, check fraud, fraud, forgery, and false reporting. (10/16/12,p1109-10,1135-40; 10/16/12(p.m.),p1785-92) He admitted he diluted his urine while on probation to pass drug tests. (10/16/12(p.m.),p1791-92)

Stackhouse admitted offering information in 1994 in exchange for work release to prevent his business from failing. (10/16/12,p1123; 10/16/12(p.m.),p1788-93) He understood he could make his work release prospects "look better." (10/16/12(p.m.),p1797-98)

Third, evidence erroneously excluded from jurors' consideration eliminated any trace of Stackhouse's credibility. (Issue IV) The lead detective, who interviewed Stackhouse, noted he seemed like a "psychopath" and thought he should take a polygraph. (10/17/12(p.m.),p2009-10)

Here, as in *People v. Urso*,269 P.2d 709(Colo.1954), "one thing was easy to determine, and that was, that the witness was a liar. When he lied or where he lied would be a hazardous guess, and verdicts in criminal cases should not be composed of guessing, speculation, or conjecture." *Id.*,711.

The prosecution offered the Carmex and Y-STR DNA analysis that Clark's parental lineage could not be excluded from a mixed sample. (10/12/12,p1722-70) But the Carmex was found outside the apartment in an inconspicuous spot – indeed, it was not discovered until the next morning. (10/11/12,p688)

No evidence established when the Carmex was deposited or who deposited it. No fingerprints were recovered. (10/16/12,p1054-55) The building manager testified his duties included cleaning common areas "more or less as needed" and that he tried to do so daily, (10/10/12,p1640), but this hardly established when the small container was left under the stairs. And Clark had been at Grisham's residence to watch the cat.

Finally, the prosecution offered two officers' testimony about driving the "most direct route" from Uhlir's apartment to Grisham's on November 29, 1994, and then separate routes to Gunbarrel. (10/12/12,p1686-93,1699-1702; P.Ex58; P.Ex.65; 10/15/12,p784-88,792-98) The officers drove these routes only once, weeks later, in contemporary vehicles, not Clark's 1960's Mustang. (10/12/12,p1687; 10/15/12,p795; 10/11/12,p718, P.Exs.53-55) And they drove the "most direct route," based on a hypothesis. (10/12/12,p1690; 10/15/12,p794)

Further, there was no evidence presented about traffic or weather on November 1, 1994. (10/15/12,p795) Meanwhile, the officers had a "pretty good

flow" of traffic on November 29. (10/12/12,p1691) They did not track their actual speed. (10/12/12,p1702; 10/15/12,p794)

The officers did not drive from the soccer stadium to Uhlir's. (10/12/12,p1700) And they did not measure the distance between Grisham's parking lot and his apartment or estimate how much time it would have taken to walk there. (10/15/12,p788,792-93) There was no evidence indicating they got out of their cars or accounted for estimated time to walk to Grisham's door and back. (*Id.*,p796-97)

The officers' driving exercise did not put Clark at the scene. Given these unaccounted-for variables and the absence of evidence of driving times and conditions on November 1, 1994, the officers' re-creation was academic. It did not contradict Clark's own statements that he drove directly home.

Even in the light most favorable to the prosecution, this evidence was insufficient in quality and quantity to put Clark at the scene.

2. The evidence did not establish Clark's gun was the murder weapon.

The murder weapon was never found. Clark admittedly possessed a 9mm handgun in October 1994. (P.Ex.59)

Clark told police in 2011 he did not remember what he did with the gun, but he likely threw it in a dumpster. (P.Ex.81) In 1994, Clark told detectives a different story about coming into possession and disposing of a 9mm handgun. (P.Ex.59)

There was testimony a Bryco-Jennings brand gun is a mass-produced, inexpensive handgun. (10/16/12(p.m.),p1872) It was possible the bullets that killed Grisham came from a 9mm Bryco-Jennings model 59 handgun, but also possible it came from one of 90-92 other manufacturers' guns, although some of those guns were not commonly found in Colorado or in existence in 1994. (10/16/12(p.m.),p1868-69,1896-97; D.Ex.G)

Moore, whose dubious credibility is addressed elsewhere, testified he paid a third man to buy a 9mm Bryco-Jennings handgun for Clark in October 1994. (10/15/12,p920-22) Moore also bought a 9mm Bryco-Jennings handgun for himself. (*Id.*) The prosecution presented a receipt and a witness who signed the receipt whose testimony partially supported Moore's purchase. (10/15/12,p988, P.Ex.74)

Moore (and only Moore) testified Clark took the larger gun. (*Id.*) There was testimony the larger Bryco-Jennings 9mm handgun is the model 59. (10/16/12(p.m.),p1875)

Weyer testified Clark showed him a cheap gun sometime in October 1994, and Weyer checked if it was loaded. (10/15/12,p870-73) Weyer could not say what day this occurred, either in 1994 or at trial, or independently remember other details. (*Id.*,p872-73,883) During Clark's 1994 interrogation, Clark said he showed Weyer the gun to impress him and Weyer took a round out and touched it, at which point Clark

took the gun back and wiped the bullet because he didn't want Weyer to leave fingerprints. (P.Ex.59,22:55-23:15,25:45-26:40) Weyer said he could not remember telling police Clark's gun was loaded with 9mm full-metal-jacket rounds, but if he said so it was true. (10/15/12,p873)

Uhlir said he lacked independent recollection, but from reviewing his 1994 interview he remembered Clark showed him a 9mm on October 26, 1994. (10/15/12,p826-32) Uhlir said the gun was loaded with hollow-point bullets. (*Id.*,p827) The bullets that killed Grisham were full-metal-jacket rounds, not hollow-points. (10/16/12,p1056-57)

Moore testified "Vanessa," who accompanied him on November 1, 1994, "freaked out," and Moore believed it was because she saw a gun in Clark's car, although he did not recall seeing it. (10/15/12,p932-34,975-76,985-86) The police spoke with Vanessa when they reopened the investigation. (10/17/12,p1254,1258) The prosecution did not present Vanessa.

In the light most favorable to the prosecution, this evidence established Clark possessed a 9mm handgun, purchased by Moore, in the month before Grisham's death. However, this evidence was insufficient to prove beyond a reasonable doubt Clark's gun committed the murder – let alone that Clark committed the murder. Or,

for that matter, that one of many other existing guns that were possible sources of the bullets was the murder weapon.

There was no weapon to test against the recovered bullets. The prosecution's theory depended on a host of suppositions lacking in sufficient quality to overcome reasonable doubt.

Rather, in the light most favorable to the prosecution, the evidence was insufficient in quality or quantity to establish (1) a 9mm Bryco-Jennings model 59 handgun killed Grisham; (2) Clark's never-recovered handgun was a Bryco-Jennings model 59; (3) Clark's never-recovered 9mm gun was the murder weapon; or (4) Clark possessed, let alone fired, the never-recovered murder weapon.

3. The motive theory defied credulity.

Because of evidentiary shortcomings already discussed, the prosecution belabored its motive theory. (10/10/12(p.m.),p1604-06,1611-12; 10/18/12,p2043-44,2059-63,2093-95,2098-99,2105) But the alleged motive was incredible.

The prosecution argued Clark murdered Grisham to avoid detection of the forgery and preserve his Marine eligibility. (10/18/12,p2044-49,2059-61,2098-99) This was unsupported by evidence.

Weyer testified Clark's chances likely ended with the motorcycle incident. (10/15/12,p867-70,882,893) Clark, when arrested for forgery, confessed immediately.

(P.Ex.59,4:05-7:30) He did not conceal it. Rather, Clark used his real name on every check. (10/12/12,p1716-20; P.Ex.61)

Clark told officers he figured he would get caught and talk with Grisham about it, so he tried to use only money he really needed. (P.Ex.59,1:40:45-1:42:20,1:45:30) Clark realized Grisham would go to KG, which would lead to him. (*Id.*,1:43:25-1:44:15) He told police he did not see Grisham discovering the forgery as an obstacle to joining the Marines. (*Id.*, 1:49:15-:30)

It is impossible to square the prosecution's theory that Clark planned the murder and evaded prosecution – including avoiding detection when fleeing, setting up an alibi, and throwing police off his trail – with Clark's commission of the forgery without trying to evade detection. Likewise, the prosecution's theory that Clark expertly planned the murder and evaded prosecution does not jibe with Clark showing a handgun to various people days before the murder or supposedly admitting the murder to Stackhouse.

Nor, finally, did the prosecution's theory rebut the facts that Clark successfully completed his probation in Colorado and returned later after successfully setting up a life with his family in Oregon. As the prosecution's reliance on facts not in evidence in opening statement and rebuttal demonstrated, (Issue VII), the prosecution created

a compelling narrative to sell the jury without evidence of sufficient quality or quantity to support it.

D. The Conviction Must Be Vacated.

Proof beyond a reasonable doubt requires far more than an evidentiary scintilla or even a preponderance. *See Jackson,supra.* Application of the beyond-a-reasonable-doubt standard "is not irretrievably committed to jury discretion." Rather, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson*,317,318,n.10.

The sufficiency question is *not* whether some evidence can be interpreted as supporting the verdict. *Id.*,320("[T]he *Thompson* 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt."). This Court must determine whether the evidence as a whole is sufficient to permit a rational juror to "reach a subjective state of near certitude of the guilt of the accused." *Id.*,315,320(the rule "protect[s] against misapplication" of the law by jury). That is the case only if the evidence is "sufficient in both quantity *and* quality." *People v. Bennett*,515 P.2d 466,469(Colo.1973)(emphasis added).

The prosecution presented a house of cards built on insufficiently proven circumstances, Clark's inability to prove his gun was not the murder weapon (which

was not his burden), and the prosecution's storytelling about motive. Even in the light most favorable, the insufficient quality of any piece of this evidence makes the entire case topple over.

The evidence was unconstitutionally lacking. This Court must vacate Clark's conviction.

II. The Court Erroneously Admitted Clark's Statements from Interrogations on November 3, 1994, and April 15, 2011.

A. Standards.

Clark preserved these claims by motions to suppress all statements from two interrogations on *Miranda* and voluntariness grounds. (CF,p118-24) After a hearing, the court made findings on August 9, 2012. (8/9/12,p1344-1505; CF,p543-46)[11]

"Custody" and voluntariness determinations involve mixed factual and legal questions. *People v. Matheny*,46 P.3d 453,462(Colo.2002); *People v. Gennings*,808 P.2d 839,844(Colo.1991). Factual findings receive deference if supported, but a court "set[s] aside findings of fact that are clearly erroneous or unsupported by the record." *People v. Humphrey*,132 P.3d 352,360(Colo.2006); *People v. Lytle*,704 P.2d 331,332(Colo.App.1985)("[W]e may not ignore uncontradicted credible evidence in the record that is contrary to the court's decision.")

[11] Unless noted, Issue II cites are to 8/9/12.

"[W]hether a person is in custody should be reviewed by appellate courts de novo" as a legal conclusion. *Matheny*,462. Likewise, legal conclusions concerning voluntariness are reviewed de novo. *Humphrey*,360.

Constitutional harmless error review applies to Fifth Amendment violations. *Arizona v. Fulminante*,499 U.S. 279(1991); *People v. Trujillo*,49 P.3d 316(Colo.2002). The prosecution bears the burden of proving error harmless beyond a reasonable doubt. *Trujillo*,326. "If there is a reasonable probability that [the defendant] could have been prejudiced by the error, then it is not harmless." *Id.*

B. Analysis.

1. Clark's statements during the lengthy 1994 interrogation were rendered involuntary by Clark's youth, fear, an implied promise of leniency, and extensive police deception.

Admitting involuntary statements violates due process and protection against self-incrimination. U.S. Const. amend. V,XIV; Colo. Const. art.II,§18; *People v. Medina*,25 P.3d 1216,1221(Colo.2001). Involuntarily extracted statements are excluded because "methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system…." *Rogers v. Richmond*, 365 U.S. 534,540-41(1961).

The State must establish the defendant's statements were voluntary by a preponderance. *Gennings*,843. A "statement is voluntary if it is the product of rational

intellect and a free will unaffected by improper influence, coercion, threats or promises." *Medina*,1222(quotations, citation omitted). Statements are involuntary where coercive governmental conduct plays a significant role in inducing them. *Humphrey*,360.

Coercive police conduct includes subtle psychological coercion. *Gennings*,843-44(citing *Fulminante*,*supra*). When subject to interrogation, the "deliberate exploitation of a person's weakness by psychological intimidation can under some circumstances constitute a form of governmental coercion that renders a statement involuntary." *Id.*,844.

Courts consider the totality of circumstances to determine voluntariness. *Medina*,1222-23(citing 13 non-exhaustive factors). A reviewing court may consider undisputed facts in the record, even if not considered by the trial court. *People v. Begay*,2014 CO 41,¶9.

Here, the court erred in finding Clark's statements during the 1994 custodial interrogation voluntary. The court relied on the interrogation's tone, finding it conversational. (p1487-88; P.Ex.2(Mots.CD)) It noted the interrogation occurred in the stationhouse interview room with multiple officers and Clark had been monitored by officers for 5-6 hours. (p1487-89) The court found that because Clark was

Mirandized, told he could take a break, afforded a bathroom break, and because police did not threaten him, his statements were voluntary. (*Id.*)

The hearing evidence painted a different story. The "conversational" interrogation was actually three hours of deception and accusations. (P.Ex.2(Mots.CD)) Clark was arrested at gunpoint for forgery, pushed up against his car, and handcuffed about an hour-and-a-half before the interrogation. (p1348-53,1366-67) He was in custody with police present for approximately 6 hours. (p1346-58)

Clark was taken handcuffed to a closed 8x13 room and interrogated around a small table by Detectives Trujillo, Weinheimer, and Weiler, all possessing guns. (p1354-56,1377-78) The room was windowless with one small door and lacked the monitoring capabilities of two-way glass or a video camera. (p1356,1407) Weiler testified: "That's why I think that we went a little bit heavier on people in there, because we knew that this was probably our single chance to have that interview." (*Id.*)

The interrogation lasted two hours, paused for a bathroom break, and continued another hour. (p1357-58) Clark was not offered food or water. (p1411-12) Weiler testified he used an interrogation tool to "put maybe some doubt in [Clark's] mind" about how much information police had. (p1359)

The interrogation was accusatory. Weiler and Trujillo admitted they "pushed" Clark for more information. (p1358,1379-80,1411) Clark admitted the forgery immediately – detectives filled the three hours with targeted interrogation about Grisham's murder. (p1380-83)

Clark, 19, had minimal experience with police. (p1385,1390) He indicated he was scared and really nervous, having never been interrogated. (p1385-86) He told officers he was "scared" and "shaken up." (P.Ex.2(Mots.CD)/Tape.1/Side.2,10:10-10:25) He was "scared out of his mind." (*Id.*,14:38-45)

Clark was not "100% there" because he nearly "pissed [his] pants" when arrested at gunpoint. (*Id.*,28:35-52) He admitted police made him "queasy and uneasy"; his pulse was racing. (*Id.*,Tape.2/Side.1,20:50-21:25) He did not even know Grisham was dead. (*Id.*,Tape.3/Side.1,9:25-35)

Officers employed deceptive tactics, conveying they possessed non-existent evidence. They implied Clark's fingerprints could be found on Grisham's doorknob and their artist's sketch would identify him. (*Id.*,Tape.2/Side.1,10:20-12:45) They implied they had shoeprints that would match Clark's shoes. (*Id.*,Tape.2/Side.2,27:20-28:50) They told Clark, "we can keep going with this cat and mouse game all night…we can ask stupid questions, you can give us these answers that don't make a

whole lot of sense to anybody, or we can figure out what the hell we're doing here." (*Id.*,Tape.2/Side.1,19:56-20:21)

Officers employed "a psychological tool," a pretextual GSR kit. (*Id.*,Tape.2/Side.2,29:00); p1310-12,1412) Knowing the kit had no evidentiary value and with no intent to actually test it, the officers told Clark they could tell whether he possessed the gun that killed Grisham. (p1310-13,1320,1324-26,1412) The officers claimed they could pick up GSR from several days previous and even determine the gun's manufacturer. (P.Ex.2(Mots.CD),Tape.3/Side.1,00:05-55)

This was patently false. Indeed, the test was never secured at the stationhouse and Trujillo claimed not to recall what happened to it. (p1313-15,1331-32)[12]

Officers lied in attempts to obtain a confession. Instead, Clark submitted to the test.

After attempting to impress Clark with the breadth of evidence collected, officers told him they could get a DA immediately because whoever talks first is the one police believe and gets the best deal. (P.Ex.2(Mots.CD),Tape.3/Side.1,11:00-13:10) At minimum, officers suggested leniency if Clark said what they wanted to hear. *See Medina*,*supra*,1222("The statement must not be the product of any direct or implied promises, nor obtained by exerting an improper influence.");

[12] At trial, Trujillo admitted he threw the phony GSR kit away. (10/17/12(p.m.),p1999-2000)

Gennings,*supra*,843; *People v. Quintana,*601 P.2d 350,351(Colo.1979)(confession involuntary where defendant encouraged to confess to make it easier on family).

Officers' false representations regarding their knowledge and evidence, while not necessarily sufficient independently, contributes to coercion. *People v. Freeman*,668 P.2d 1371,1380(Colo.1983); *see also Lytle*,*supra*,332(court erred finding defendant's confession voluntary when, relying on fact defendant did not confess to all accusations, it found defendant's will not overcome by officers' promises, threats, and misrepresentations); *cf. People v. Zamora*,940 P.2d 939,942(Colo.App.1996)(police deception not condoned, but limited "ruses" permitted; deception alone does not invalidate consent to search, but is one factor considered).

Added to the deception, misrepresentation of evidence, and implied promises, Clark was 19 with minimal police experience. He had never been interrogated, let alone for a long period of time and for such serious allegations.

Courts and social science acknowledge juveniles are particularly susceptible to interrogation tactics. Qualities distinguishing adolescents from adults do not disappear at 18. *Roper v. Simmons*,543 U.S. 551,574(2005). "[P]arts of the brain involved in behavior control continue to mature through late adolescence." *Graham v. Florida*,560 U.S. 48,68(2010).

Studies show our brains continue to develop through young adulthood into the mid-20s. *See*, *e.g.*,Office of Research and Statistics Div. of Crim. Justice, *Crime and Justice in Colorado* 137(Mar.2011)(best estimate for when brain matures is 25); Lebel and Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. Neurosci. 10937,10937-38,10943(2011); Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174 (2004); *see also J.D.B. v. North Carolina*,131 S. Ct. 2394,2403,n.5(2011) ("Citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions….").

"Juveniles may be especially vulnerable to the pressures of interrogation, which can cause them to give involuntary or even false confessions." Internat'l Assoc. of Chiefs of Police and Office of Juvenile Justice and Delinquency Prevention, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* 3(Sept.2012). Sensitive techniques must be employed in juvenile interrogations, which remains true even with older teenagers. *Id.*,p7.

These techniques include extra care in *Miranda* warnings, reducing interrogation length, taking breaks at least hourly, and providing food and drink. *Id.*,p7-8. Deception should be avoided, particularly implications police have non-existent evidence. *Id.*,p8.

Clark was months past 19. His youth and inexperience, combined with the lengthy and confrontational interrogation, and multiple instances of police deception, misrepresentations, and implied leniency, rendered his statements entirely involuntary.

The prosecution did not establish voluntariness by a preponderance. *See Gennings*,*supra*,843. The court erroneously allowed Clark's statements into evidence at trial through admission of the recorded interrogation, violating Clark's constitutional rights. U.S. Const. amend. V,XIV; Colo. Const. art.II,§18; *Medina*,*supra.*

2. Clark's statements during the federal agents' surprise April 15, 2011 workplace interrogation were the product of unwarned custodial interrogation.

The United States and Colorado Constitutions guarantee the privilege against self-incrimination and the right to counsel during custodial interrogation. *See* U.S. Const. amends. V,VI; Colo. Const. art.II,§§18,25; *Miranda v. Arizona*,384 U.S. 436,444(1966).

A suspect "is entitled to a *Miranda* advisement if he is both in custody and subject to interrogation." *People v. Sandoval*,218 P.3d 307,309(Colo.2009). Statements during custodial interrogation and absent *Miranda* advisements must be suppressed to protect a defendant's due process rights. *Matheny*,*supra*,462.

A suspect is interrogated when an officer asks a question or makes a statement reasonably likely to elicit a response. *Rhode Island v. Innis*,446 U.S. 291,292(1980);

People v. Patnode,126 P.3d 249,257(Colo.App.2005). An individual is "in custody" when "under the totality of the circumstances, a reasonable person in the defendant's position would consider himself to be deprived of his freedom of action to the degree associated with a formal arrest." *Matheny*,468. Several non-exhaustive factors inform this totality-of-the-circumstances determination. *People v. Elmarr*,181 P.3d 1157,1162(Colo.2008)(listing factors).

Here, the court erroneously found Clark not in custody during the surprise 2011 workplace interrogation, during which he was not *Mirandized*.

The court found the interrogation non-custodial, largely because of the conversational tone, "even to the extent of trying to reassure [Clark] that he was not the target or he was not in trouble." (p1491) The court also found it "significant" Clark received and made short phone calls towards the end. (*Id.*)

The hearing revealed, however, that two armed federal agents, identified by Ace employees as "Uh-oh, guys in black shirts," arrived unannounced. (p1415-18,1440-43,1471; P.Ex.4(Mots.CD),3:50-55) Jonathan Grusing was an FBI special agent and Chris Amon an ATF agent. (p1415-16) Clark had never met either. (p1440)

It was during business hours and multiple employees had contact with the agents as they entered. (p1419; P.Ex.4(Mots.CD),2:20-5:00) The interrogation occurred behind closed doors in the backroom, lasting an hour. (p1419-21) Grusing

testified they interrogated Clark at work because they thought Clark would talk more and in the backroom "because we didn't think that anyone around should hear the nature of our conversation." (p1419)

"[T]here can be few places more intimidating or potentially coercive to an individual than one's place of employment." *People v. LaFrankie*,858 P.2d 702,707,n.5(Colo.1993) *abrogated on other grounds by Matheny*,*supra.* Intimidation is greater in the presence of other employees and when escorted to a backroom. *See id.*(citing *United States v. Carter,*884 F.2d 368(8th.Cir.1989)(employee questioned by police in bank president's office subjected to custodial interrogation); *United States v. Nash,*563 F.2d 1166(5th.Cir.1977)(interrogation custodial where suspect taken to workplace security office by supervisor, interrogated by FBI agent for 45 minutes with door closed, and not informed he had right to leave); *United States v. Phelps,*443 F.2d 246(5th.Cir.1971)(interrogation custodial where police questioned suspect at business); *see also United States v. Kim*,292 F.3d 969,974(9th.Cir.2002)(noting "critical distinction" between police asking suspect to come to station and police confronting suspect at place of business and finding store co-owner in custody when interrogated inside her deli); *cf. United States v. Dockery,*736 F.2d 1232(8th.Cir.1984)(police questioning at workplace not custodial where defendant initiated interview and told

she did not have to answer questions, was not under arrest, and was free to leave at any time).

The agents purposely surprised Clark at work. They "figured it'd catch [him] off guard." (P.Ex.4(Mots.CD),5:40-45) They immediately began interrogation – they did not say that he was free to leave, not under arrest, did not have to talk with them, or could end the encounter any time.

The court's observations about the agents' non-accusatory conduct overlooked their deceptive design. (p1439-40,1444-46) They devised a plan to engage Clark with supposed investigation of Russian gangsters and Chicago "gangbangers." (P.Ex.4(Mots.CD),6:00-10:00,19:00-19:05,21:55-22:20) They wanted Clark to believe they were investigating Moore in hopes of eliciting incriminating information. (*Id.*)

Indeed, they used the ploy of FBI and ATF involvement to make the deception more convincing. (p1469-70) They told Clark federal investigations were more sophisticated than local ones and cited Russians with whom Moore had been involved. (*E.g.*,P.Ex.4(Mots.CD),8:55-9:20) They warned that false statements to federal agents carried high penalties; lying to a grand jury, "you get popped and you spend jail time. It's actually a year of prison time." (*Id.*,10:55-11:05)

A reasonable person at work during business hours, confronted out-of-the-blue, by unknown federal agents dressed in black, led to the backroom and

immediately interrogated concerning Russian and Chicago gangsters must consider himself deprived of freedom to act to a degree associated with formal arrest. *See Matheny*,*supra*. The court erred in finding the interrogation non-custodial, violating Clark's constitutional rights. U.S. Const. amend. V,VI; Colo. Const. art.II,§§18, 25; *Miranda*, *supra*. The entire un-*Mirandized* interrogation should have been suppressed.

3. Erroneous admission of Clark's statements requires reversal.

The 1994 interrogation was admitted at trial. (P.Ex.59) The April 15, 2011 interrogation was admitted with prosecutorial redactions. (P.Ex.81)

A linchpin of the prosecution's case was convincing the jury Clark's gun was the murder weapon. The prosecution began opening statements by referencing Clark's alleged statement to Stackhouse that "they'll never find the gun," referring to that alleged admission twice more. (10/10/12(p.m.),p1598,1608) Neither Clark's gun nor the murder weapon was ever recovered; the only evidence of what happened to Clark's gun came from statements during interrogation.

In 1994, Clark said the gun was left under the passenger seat of his car by a guy named Luis whom Clark met in Denver's Montbello neighborhood. (P.Ex.59,19:40-22:15,30:30-32:15,35:45-36:05,50:30-40,2:47:45-2:52:55) Clark said he returned to Montbello the next weekend, but could not find Luis and left the gun with a third person. (*Id.*,25:00-45,32:25-32:45,36:05-36:15,51:05-15)

The interrogating officers grilled Clark on this, saying his story didn't make sense, that it was "bullshit" and "incredible." (*Id.*,51:00-52:15,2:32:55-2:33:15,2:42:55-2:43:30) Clark maintained its truth. (*Id.*,2:00:20-2:01:20,2:29:50-2:30:05,2:47:45)

Towards the end, officers suggested retracing Clark's steps. (*Id.*,2:45:45-2:46:15,2:48) Clark said he would, but did not think it would accomplish anything because Montbello residents would not talk to police. (*Id.*,2:46:15-35) Police told Clark his explanation about the gun was the "big, black hole" in his story. (*Id.*,2:48:05-15)

In 2011, Clark agreed he got the gun from Moore. (P.Ex.81,00:30,2:20,3:45-4:10) He did not remember where Moore got it and could not remember what he did with it; it was long ago and a rough time in his life. (*Id.*,2:20-55) He said he shot the gun in a field once and kept it unloaded under his car's passenger seat while he briefly possessed it. (*Id.*,7:30-8:30,18:25-19:35)

The agents said Moore claimed Clark said he needed the gun because someone was stalking him. (*Id.*,8:35-9:05) Clark said that was a lie; he had wanted a gun to seem tough. (*Id.*) He told the agents he most likely threw the gun in a dumpster in Gunbarrel, near where he was living. (*Id.*,14:00-15,15:15-17:15,20:10) He said he got nervous having it around because it wasn't on the "up and up." (*Id.*,20:35-55)

The prosecution made much of these discrepancies at trial. In the opening statement, the prosecutor called Clark's 1994 explanation an "incredible story," and "complete fabrication." (10/10/12,p1607,1610) In closing, he argued Clark's 1994 version was "completely fabricated." (10/18/12,p2045) He argued Clark's story of taking the gun back to Montbello and giving it to an unknown person was "unbelievable." (*Id.*,p2046)

The prosecutor cited Clark's conflicting statements as evidence of motive and credibility. (*Id.*,p2059-62,2064,2067) He cited Clark's 1994 statement that attempting to relocate the gun would be useless as consciousness of guilt and misleading police. (*Id.*,p2062-63) And the prosecution returned to the 1994 interrogation in rebuttal, arguing Clark was not truthful: "Everything [Clark] said was misleading, everything was said was designed to steer the police away from his gun, the gun that he purchased." (*Id.*,p2096-97)

In 2011, Clark admitted that in 1994 he told Moore a made-up story about being stalked. (P.Ex.81,8:35-9:05) In 1994, he admitted he told Weyer made-up, "crap" stories about fights and guns to seem "stronger or tougher or something." (P.Ex.59,22:15-23:15)

Finally, the prosecutor urged jurors to listen to Clark's 1994 statements, arguing Clark misled detectives about showing the gun to Weyer. (*Id.*,p2048) The jury

followed the prosecutor's suggestion, requesting access to the 1994 interrogation transcript on the first day of deliberations. (10/18/12,p2113) The jury listened to the audio recording with the transcript the morning of the second day until 11:30-12:30, then requested the 2011 interrogation at 1:45p.m. (*See* 10/18/12,p2124; Supp.Access-Juror.Questions,p532-33(attached Appendix A)) After listening to both interrogations, jurors continued deliberations through Friday afternoon, broke for the weekend, and continued Monday. (*Id.*; CF,p647; 10/22/12,p1534)

Prosecutorial use of the interrogations reversibly prejudiced Clark. While neither version established Clark possessed the murder weapon, admission of conflicting statements about obtaining and disposing of a gun in October 1994 damaged Clark's credibility, as did admissions about making up stories to look tougher to Moore and Weyer. The prosecution capitalized, labeling Clark's statements "incredible" and "unbelievable" and attacking his credibility to argue guilt.

As detectives perceived in 1994, the absent murder weapon was a "black hole" in the prosecution's case. The prosecution relied on erroneously admitted statements to fill it.

It is reasonably probable Clark was prejudiced by the erroneously admitted statements; the State cannot prove their admission harmless beyond a reasonable

doubt. *See, e.g.,Fulminante*,*supra*; *Trujillo*,*supra*. This Court should reverse and order the interrogations suppressed.

III. The Court Reversibly Erred in Admitting the Motorcycle Incident as *Res Gestae*, Leading to Numerous Mentions of an Irrelevant Past Bad Act Without a Limiting Instruction.

A. Standards.

This issue is preserved through Clark's pretrial motion for disclosure of other bad acts and objections to admission of the motorcycle incident as *res gestae* or CRE 404(b) evidence. (CF,p129; 9/5/12,p2212-17)

Evidentiary determinations generally receive abuse of discretion review. *See, e.g.,People v. Muniz*,190 P.3d 774,781(Colo.App.2008)(court's evidentiary ruling abused discretion; applying constitutional harmless error standard). However, legal conclusions supporting admission of evidence receive de novo review. *See People v. Heilman*,52 P.3d 224,227(Colo.2002)(deference accorded factual findings, legal conclusions reviewed de novo); *see also United States v. Blue Bird*,372 F.3d 989,991(8th.Cir.2004)(interpretation and application of most evidentiary rules are legal matters warranting de novo review).

Preserved evidentiary errors implicating constitutional rights are reviewed for harmlessness beyond a reasonable doubt. *See People v. Miller*,113 P.3d 743,749(Colo.2005)(constitutional harmless error review applies to constitutional

claim preserved through contemporaneous objections); *see also Chambers v. Mississippi*,410 U.S. 284(1973)(erroneous evidentiary rulings violated due process).

A reviewing court determines "'whether the guilty verdict actually rendered in this trial was surely unattributable to the error,'" and "'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered.'" *People v. Fry*,92 P.3d 970,980(Colo.2004)(quoting *Sullivan v. Louisiana*,508 U.S. 275,279(1993)). A reasonable possibility of prejudice requires reversal. *Leonardo v. People*,728 P.2d 1252,1257(Colo.1986)(citing *Chapman v. California*,386 U.S. 18,23-24(1967)).

B. Admission of the Motorcycle Incident, which was Not *Res Gestae* or Otherwise Admissible, Reversibly Prejudiced Clark.

Due process guarantees a fair trial and impartial jury. U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25; *People v. Harlan*,8 P.3d 448,459(Colo.2000). Those rights require a "fair verdict, free from the influence or poison of evidence which should never have been admitted, and the admission of which arouses the passions and prejudices which tend to destroy the fairness and impartiality of the jury." *Oaks v. People*,371 P.2d 443,447(Colo.1962). A jury misled by inadmissible evidence or argument is not impartial. *Id.*; *accord Harris v. People*,888 P.2d 259,264(Colo.1995). Evidence demonstrating bad character or propensity to commit crimes is generally inadmissible. *E.g.*,CRE 404; *Stull v. People*,344 P.2d 455(Colo.1959).

> *Res gestae* is a theory of relevance which recognizes that certain evidence is relevant because of its unique relationship to the charged crime. It includes incidental matters necessary to explain the charged crime, and provides the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred. Generally, *res gestae* evidence is linked in time and circumstances to the charged crime.

People v. Thomeczek,284 P.3d 110,114(Colo.App.2011)(quotations, citations omitted).

Res gestae must be "relevant" and relevance must "not be outweighed by the danger of unfair prejudice." *Id.* Admission of prior misconduct always possesses substantial potential for unfair prejudice. *People v. Nuanez*,973 P.2d 1260,1263(Colo.1999).

While CRE 403 "favors the admission of evidence," it is an "important tool to exclud[e] matters of scant or cumulative probative force." *Yusem v. People*,210 P.3d 458,467(Colo.2009).

> The balancing required by CRE 403 contemplates the consideration of such factors as the importance of the fact of consequence for which the evidence is offered, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, if appropriate, the potential effectiveness of a limiting instruction in the event of admission.

Id.,467-68(quotations, citation omitted).

The prosecution moved pretrial for admission of Clark's stolen motorcycle arrest and other surrounding facts as *res gestae* or under CRE 404(b). (CF,p571-77; 9/5/12,p2208-12,2218-22) Clark objected under both theories. (9/5/12,p2212-17)

The prosecutor argued the motorcycle case was necessary to explain "[Clark's] sort of downward spiral" and his Marine eligibility. (*Id.*,p2208) The court ruled the charge against Clark and its disposition could come in at trial to explain the prosecution's theory that Clark's desire to avoid criminal charges caused him to murder Grisham to avoid discovery of the forgery. (9/5/12,p2225-27)

The court found that while prejudicial, prejudice did not outweigh probativity because "the evidence really does go to the intent and the motive of [Clark]." (*Id.*,p2226) The court issued a minute order admitting evidence of the motorcycle incident as *res gestae* "because it relates to [Clark's] status as a potential recruit for the Marine Corps and is relevant to show [Clark's] motive to kill [Grisham]." (CF,p582)

The court erred. In Colorado, prior misconduct may be admitted as *res gestae*, not subject to 404(b)'s procedural limitations, only if the evidence is "incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without knowledge of which the main fact might not be properly understood." *People v. Rollins*,892 P.2d 866,872-73(Colo.1995)(quotations, citation omitted).

The motorcycle incident was not *res gestae* – it was not "linked in time and circumstances to the charged crime." *Thomeczek*,*supra*,114. The incident occurred September 22, 1994, nearly six weeks before the homicide. (CF,p573) There was no "unique relationship" between the incident and the homicide. Nor was it necessary to explain the homicide – there was only the prosecution's tortured theory that the arrest sent Clark on a "downward spiral" from theft to homicide in under six weeks. (9/5/12,p2208)

The court's error is clear by its ruling, which found the incident relevant to show "intent" and "motive" to kill. (9/5/12,p2226; CF,p582) This demonstrated the evidence was admitted for 404(b) purposes. CRE 404(b); *People v. Spoto*,795 P.2d 1314,1318(Colo.1990).

The court did not perform 404(b) analysis, but the evidence fails because it was not relevant to motive or intent. *Spoto*,1321. The incident was not intrinsic to the alleged motive – it was unnecessary to explain Clark's involvement in the forgery or desire to avoid detection. The prosecution did not present the precise evidentiary hypothesis required under 404(b). *Yusem*,*supra*,464,469.

Moreover, trial evidence demonstrated Clark was likely ineligible for the Marines before the forgery. (10/15/12,p882,893) This put the lie to the prosecution's claim of the motorcycle incident's relevance. Given Clark was already

ineligible, the theory that he intended to cover up the forgery to preserve Marine eligibility made no logical sense. There was no proper independent purpose under 404(b).

The prosecution's true, improper purpose for the evidence was revealed in arguing admission was "necessary to explain "[Clark's] sort of downward spiral." (9/5/12,p2208) The prosecution wanted to convey Clark acted in conformity with bad character.

Even assuming, *arguendo*, the evidence was admissible under CRE 404(b), that would not negate the error. The evidence came in unfettered by any limiting instruction, allowing jurors to consider it for any purpose, including propensity. *See*, *e.g.*,*People v. Miller,*890 P.2d 84 (Colo.1995) (court must give limiting instruction to jury when evidence introduced and again with final instructions because of 404(b) evidence's prejudice).

Despite the court's (erroneous) finding that the incident was only relevant to Clark's motive and intent, the jury was not so instructed. In *Spoto,* the court's failure to instruct the jury *carefully enough* to reduce the probability of prejudice constituted reversible error. *Spoto*,1321. Here, where there was *no cautionary instruction, Spoto* dictates reversal.[13]

[13] The State may argue Clark did not request cautionary instructions. Clark, however, objected to admission on any grounds and had no grounds to request 404(b)

The prosecution exploited the error, prominently noting the incident in both opening statement and closing argument, (10/10/12(p.m.),p1604; 10/18/12,p2044), and eliciting it repeatedly during trial:

- KG testified she was on the back of the motorcycle when Clark was arrested. The incident "stunned" her. (10/11/12,p568)

- A detective testified PG told her on November 2, 1994, she thought the "motorcycle business" scared the "bejabbers" out of Clark because he really wanted to get into the Marines. (10/11/12,p651)

- During the 1994 interrogation, Clark told detectives he last saw KG around the beginning of October when he got caught with the motorcycle. Later, he told them that when he got arrested for the motorcycle thing, he let Weyer down. (P.Ex.59,17:40-18:05,35:15-30)

- Barb Lennon, police report specialist, testified that the day of the murder Grisham told her about problems with KG, including the motorcycle incident with "this boy." Lennon testified she identified Clark from the incident report and radioed Clark's name out when the murder report came in. (10/15/12,p768-69, 772)

- Weyer testified he vaguely recalled talking to the DA on Clark's behalf, trying to eliminate Clark's pending legal action so Clark could enlist. On cross-examination, Weyer said if the motorcycle charge stuck, Clark could not have enlisted. Weinheimer confirmed Weyer said the same in 1994. (10/15/12,p867-70,882,893)

- Stackhouse testified Clark told him about the stolen motorcycle, and Stackhouse told police. (10/16/12,p1117-18) An officer testified to receiving this information, relaying Stackhouse mentioned a stolen motorcycle, Coal Creek Canyon, and "some speed."

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cautionary instructions after the court ruled, with the 404(b) issue squarely before it, the evidence was *res gestae*, not 404(b) evidence. Under Colorado law, *res gestae* need not comport with 404(b)'s procedural requirements. *Rollins*,*supra*,873.

(10/16/12(p.m.),p1817) Detective Heidel testified that while Stackhouse knew about the motorcycle, newspaper articles about Grisham's murder did not mention it. (10/17/12,p1195,1277)

- Hackman testified she did not know about the motorcycle incident and had she known, she probably would not have dated Clark. (10/16/12(p.m.),p1846)

This evidence's inherent prejudice was illustrated in voir dire where a juror was dismissed due to familiarity with newspaper stories about the motorcycle theft and Grisham's request the afternoon of the murder to change his locks after discovering checks were missing. (10/9/12,p226) The juror opined, "it sounded like [the two incidents] were inadmissible in court." (*Id.*)

The juror said "thinking about those two pieces of information, especially the motorcycle theft, where it goes in my mind is [Clark] was on the verge of being apprehended for a crime and acted in a desperate manner…." (*Id.*,p228) The court cut the juror off and excused him. (*Id.*)

The court's erroneous admission of the motorcycle incident injected "collateral issues into the case which [were] not unlikely to confuse and lead astray the jury." *Spoto*,1320(quoting *Stull*,*supra*,458).[14] The incident cast Clark as a repeat offender, even before the homicide allegations.

[14] To the extent necessary to explain why Clark was a suspect or to contextualize Stackhouse's testimony, mention of "information received" would have sufficed. *See, e.g.,United States v. Maher*,454 F.3d 13,20 (1st.Cir.2006).

Because the error was not harmless (much less harmless beyond a reasonable doubt) such that this Court "can say with fair assurance that, in light of the entire record of the trial, the alleged error did not substantially influence the verdict or impair the fairness of the trial," reversal is required. *People v. Frost*,5 P.3d 317,322(Colo.App.1999); Crim.P.52(a).

IV. The Court Erred When it Precluded Clark from Asking Detective Trujillo About His Perception of the Snitch's Credibility – Relevant, Admissible Testimony under *Davis* and *Conyac* – Violating Clark's Rights to a Complete Defense, Fair Trial, and Impartial Jury.

A. Standards.

This issue is preserved by trial arguments. (10/17/12(p.m.),p2010) See III.A. for standards.

B. Analysis.

Due process guarantees a fair trial and impartial jury. U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25; *see, e.g.*,*Harlan*,*supra*,459. Due process also includes the right to present evidence in support of a complete defense, which implicates fair trial rights. U.S. Const. VI,XIV; *see Taylor v. Illinois*,484 U.S. 400,408-09(1988); *Chambers v. Mississippi*,*supra*; *People v. Pronovost*,773 P.2d 555,558(Colo.1989).

Generally, one witness's comments about another's truthfulness are improper. *Davis v. People,*2013 CO 57,¶15; *accord People v. Conyac*,2014 COA 8,¶61. However, a police officer may testify about assessment of interviewee credibility when offered in

context with interrogation tactics and investigative decisions. *Davis,*¶19; *Conyac*,¶61. Admissibility hinges on how the testimony is elicited and offered. *Id.*

During Trujillo's testimony in the defense case, the prosecution moved to preclude Clark from asking about notes Trujillo took when interviewing Stackhouse "to the effect that perhaps a polygraph would be appropriate for this person." (10/17/12(p.m.),p2009) Clark responded:

> Trujillo put in his notes that he wanted – was thinking about polygraphing Stackhouse because he thought that he might be a psychopath. If [Trujillo] has questions about [Stackhouse's] credibility and he is a lead investigator at the time, we're allowed to follow up on that and say, Did you ever do that and why did you write that.

(*Id.*,p2010) The prosecutor argued credibility is a jury question. (*Id.*) The court granted the prosecution's motion, citing *People v. Wittrein*,221 P.3d 1076(Colo.2009), *Liggett v. People*,135 P.3d 725(Colo.2006), and *People v. Cook*,197 P.3d 269(Colo.App.2008). (*Id.*)

The court erred. As in *Davis* and *Conyac*, inquiry into Trujillo's assessment of interviewee credibility was permissible when proffered in the context of his interrogation tactics. *Davis*,¶¶5,19-21; *Conyac*,¶¶61,73-75.

Trujillo questioned Stackhouse's credibility while interviewing him. Trujillo's interview notes contemplated a polygraph and whether Stackhouse was a

"psychopath." (10/17/12(p.m.),p2009-10) The officer's decisionmaking during the interview was fair game.

Davis permits officer testimony about interview tactics, including confronting the interviewee when the officer feels the interviewee is being untruthful. *Conyac*,¶74. Indeed, *Conyac* involved an *actual* polygraph exam, not just consideration of one, mention of which had been avoided during the officer's testimony. *Id.*,¶¶65-66. This Court found that procedure appropriate.

While polygraph evidence is often barred, here the prosecutor opened the door by walking Stackhouse through the transcript of his November 1994 interview with Detective Trujillo.[15] (10/16/12(p.m.),p1804-07); *see Golob v. People*,180 P.3d 1006,1012(Colo.2008)("opening the door" represents effort to prevent party from gaining and maintaining unfair advantage by selective presentation of facts that, without elaboration or context, create incorrect or misleading impression); *People v. Mann*,646 P.2d 352,361(Colo.1982)(under certain circumstances, rule favoring admission of entire statement governs over exclusion of refusal to take polygraph); *see also Cargill v. State*,340 S.E.2d 891,911(Ga.1986) *overruled on other grounds by Manzano v. State*,651 S.E.2d 661(Ga.2007)(defendant could not complain about polygraph results

[15] The court overruled Clark's objection to using the interview on redirect because Stackhouse already had testified to past statements. (10/16/12(p.m.),p1806)

where he opened door); *State v. Albert*,277 S.E.2d 439,441(N.C.1981)(prosecution permitted to elicit polygraph evidence because defense opened door).

Clark was not seeking to admit polygraph results or a polygraph examiner's testimony, subjects that raise reliability concerns typically rendering polygraph evidence inadmissible. *See People ex rel. M.M.*,215 P.3d 1237,1248(Colo.App.2009). Nor was refusal to take a polygraph at issue. *See Mills v. People*,339 P.2d 998(Colo.1959). Rather, the evidence was the officer's observations that the content of Stackhouse's claims and his demeanor raised concerns that could be tested via polygraph. *See Conyac*,¶¶65-66.

The court could have directed counsel to avoid saying "polygraph," as in *Conyac*, while still allowing inquiry into Trujillo's interactions with Stackhouse where he thought Stackhouse was untruthful. Under *Davis* and *Conyac*, Clark should have been permitted to ask whether Trujillo thought Stackhouse was being untruthful and whether Trujillo considered interrogation techniques to test Stackhouse's truthfulness.

Indeed, the court employed similar measures only moments earlier when Trujillo mentioned, without prompting, that he performed a polygraph on KG. (10/17/12(p.m.),p2003-05) There, the court allowed questions about Trujillo's interview with KG, but cautioned counsel to phrase the questions carefully and avoid polygraph references. (*Id.*)

The court also could have provided a limiting instruction like those approved in *Davis*,¶¶5,21 and *Conyac*,¶74, to defuse improper inferences. Further, Trujillo was cross-examined by the prosecution and Stackhouse testified, "which provided the jury 'ample opportunity to judge the credibility of the [witnesses'] for itself, independent of the [detective's] statements.'" *Davis*,¶21 (quoting *People v. Lopez*,129 P.3d 1061,1067(Colo.App.2005)). And the jury received the model credibility instruction. (Supp.Access,p543(jury.inst.7))

There are "strong similarities" between the testimony permitted in *Davis* and *Conyac* and the testimony prohibited here. *Conyac*,¶74. The difference is here the inquiry was excluded, whereas in those cases officers were permitted to testify to their observations of interviewee truthfulness in connection with interviewing techniques.

The court's error cannot be deemed harmless, let alone harmless beyond a reasonable doubt.

Stackhouse was the prosecution's key witness in this entirely circumstantial case. Only Stackhouse claimed Clark, allegedly, made admissions about the homicide. The prosecution deemed Stackhouse's testimony so critical that it began opening statements with Clark's alleged admission to Stackhouse: "They can't charge me because they'll never find the gun." (10/10/12(p.m.),p1598) The prosecutor referenced that alleged admission twice more in opening statement. (*Id.*,p1608)

Attacking Stackhouse's credibility was crucial to Clark's defense. (*See*, *e.g.*,10/10/12(p.m.),p1620-21,1622-23; 10/18/12,p2085-87) While the prosecution tried to mitigate Stackhouse's credibility problems, he was highly problematic. Stackhouse was a cocaine addict, probation violator, and six-time felon on temporary release from prison whose past crimes included false information to a police officer. (10/16/12,p1109-22,1135-40; 10/16/12(p.m.),p1785-92); *see* Facts, Issue I.

The prosecution elicited self-bolstering testimony – Stackhouse claimed he had never testified, feared what would happen if California inmates knew he was testifying, and he testified out of moral scruples. (10/16/12(p.m.),p1122-23,1810) Indications the interviewing detective doubted Stackhouse's veracity and psychological makeup – doubts contemporaneous with Stackhouse's claims in 1994, not stale 18-year-old recollections – would have devastated Stackhouse's supposed moral rectitude.

Trujillo's interview notes could have shed result-changing light on Stackhouse's testimony. *See Tevlin v. People*,715 P.2d 338,342(Colo.1986)(reversal required if reasonably possible error contributed to verdict); *People v. Quintana*,665 P.2d 605,612(Colo.1983)(reversal required if errors substantially influence verdict or trial's fairness).

Given the central significance of Stackhouse's testimony, there is *at least* a reasonable possibility the error affected the verdict, violating Clark's rights to a fair trial, impartial jury, and a complete defense. *See* U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25. This Court should reverse.

V. Conversely, the Court Plainly Erred in Allowing Prosecutorial Comments on Clark's Truthfulness, Violating *Wittrein*, *Liggett*, and *Cook*.

A. Standards.

Clark did not object. Review is for plain error, obvious and substantial errors requiring reversal when they undermine the trial's fundamental fairness, casting serious doubt on the conviction's reliability. Crim.P.52(b); *Hagos v. People*,288 P.3d 116,120(Colo.2012).

B. Analysis.

This exchange concerning Clark's 1994 interrogation occurred during prosecutorial cross-examination of Trujillo:

> Q. And I think earlier, if I remember correctly, [counsel] asked you if [Clark] – after you did [the fake GSR test] if [Clark] had confessed and you said no?
>
> A. Correct.
>
> Q. Now throughout the course of the interview, did you and [Weiler] and Weinheimer repeatedly ask [Clark] to tell you the truth?
>
> A. Yes, we did.

> Q. And I know she said he didn't confess, but you asked him repeatedly to tell you the truth?
>
> A. Yes.
>
> Q. Did he tell you the truth about where he got the gun?
>
> A. He did not.
>
> Q. Did he tell you the truth about what he did with the gun?
>
> A. I don't believe so.

(10/17/12(p.m.),p2023-24)

Under CRE 608(a), witnesses may not opine that another witness told the truth on a specific occasion. *E.g.*,*Wittrein*,*supra*,1081; *Liggett*,*supra*,732("Credibility determinations are to be made by the fact-finder, not by the prosecutor or a testifying witness."); *Cook,supra*,276(admitting officer's opinion about child witness's credibility constituted plain error); *see also United States v. Hill*,749 F.3d 1250(10th.Cir.2014)(expert's opinion on defendant's credibility constituted reversible plain error).

Trujillo's testimony violated this well-established rule. Unlike *Davis* and *Conyac*, the testimony was not couched in interviewing techniques, unless asking the interviewee to "tell the truth" constitutes a specialized interviewing technique.

Even if *Davis* permitted this – and that interpretation obliterates CRE 608(a) – here the court did not take *Davis's* precautionary measures. The jury was not instructed the testimony "provide[d] context for the detective's interrogation tactics and investigative decisions." *Davis*,¶19. And the jury was not provided a limiting instruction like those approved in *Davis*,¶¶5,21, and *Conyac*,¶74.

The error was obvious – the court cited *Wittrein*, *Liggett*, and *Cook* moments earlier in prohibiting inquiry into Trujillo's interview of Stackhouse.

It was also substantial. First, the prosecutor implied Clark lied when he did not confess ("I know [counsel] said he didn't confess, but you asked him repeatedly to tell you the truth?"). The prejudice of this implication is obvious and egregious. *See*, *e.g.*,*Wend v. People*,235 P.3d 1089,1098(Colo.2010)(prosecutor's personal attacks on defendant's veracity represent heightened prejudice, threatening fundamental fairness of jury's verdict).

Second, disposition of Clark's gun and the prosecution's theory it was the murder weapon were key disputed facts. Commentary of a lead detective that Clark lied about the gun damaged Clark's defense.

Third, the prosecution argued in closing that Clark "fabricated" what he told police about the gun. (10/18/12,p2045) In rebuttal, the prosecutor argued "everything he said [to the detectives in 1994] was untrue. Everything he said was

misleading, everything [he] said was designed to steer the police away from his gun, the gun that he purchased." (*Id.*,p2096-97) Addressing Clark's explanation of what he did with the gun, the prosecutor said, "we know that's not true." (*Id.*,p2097)

Beyond prejudice to Clark's defense, the court's failure to act offended fundamental fair trial guarantees. *See* U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25; *Harlan*,*supra*,459. The court found this same truthfulness inquiry improper as to Stackhouse (Issue IV), but proper as to Clark.

The court erred twice. Had Clark been allowed to inquire of Trujillo's interrogation observations, damning testimony about Stackhouse would have emerged. And, because the court precluded the testimony as to Stackhouse's interview statements, but allowed the testimony without limitation with respect to Clark's interview statements, it violated fundamental fairness.

The court plainly erred, requiring reversal. *See* CRE 608(a); *Hill*,*supra*; *Wittrein*,*supra*; *Liggett*,*supra*; *Cook*,*supra*.

VI. The Court Reversibly Erred by Precluding Clark from Inquiring about Police Investigation of a Green Car Spotted Near the Crime Scene Contemporaneous with the Homicide.

A. Standards.

Clark preserved this issue by motion and arguments. (10/17/12(p.m.),p1918-24) See III.A. for standards.

B. The Evidence was Relevant Nonhearsay, Necessary to Eliminate Juror Confusion Created by Prosecution Evidence.

Due process insures a fair trial and impartial jury, including the right to present evidence in a complete defense. U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25; *see Taylor v. Illinois*,*supra*,408-09; *Chambers v. Mississippi*,*supra*; *Pronovost*,*supra*,558.

Several prosecution witnesses testified Clark owned a car painted partially green and partially silver. The court erroneously prevented Clark from presenting evidence explaining the prosecution's confusing and misleading elicitation of evidence about Clark's car and its coloring.

Weiler testified about photos of Clark's car, an old Mustang. (10/11/12,p718; P.Exs.53-55) The prosecutor asked Weiler to describe the Mustang's "coloring." (10/11/12,p718) Weiler testified it was painted with "primer gray," and "portions of it where some green kind of shows through." (*Id.*)

Uhlir testified Clark had an old Mustang. (10/15/12,p815) The prosecutor asked about its color. (*Id.*) Uhlir said it had a "flat silver" primer and "[g]reen like a – not like a flat – like an old green. Not really no shimmer, just kind of that flat, dull green." (*Id.*) Uhlir remembered the color from reviewing and listening to his 1994 interview. (*Id.*) On cross-examination, Uhlir said the car had green spots, but was "more primer than anything else." (*Id.*,p846-47)

The prosecutor asked Stackhouse if he remembered talking to Clark about a car:

> Q. What did he tell you about a car?
>
> A. They think it's a Chrysler, but it's not a Chrysler, it's a Ford LTD.
>
> Q. Give the jury some context as to what he was talking about when he said they think.
>
> A. They think I was driving a Chrysler at the time, and I was not driving a Chrysler. He was – he was – it was a Ford FTD (sic). They think the car was black. I said the car? He said yes, the Chrysler was black. I said well, was it? He said no. I drive a silver and green Ford LTD.
>
> Q. Do you recall in that interview with Sgt. Meals telling him that Mike said the car they had is not a Chrysler car. It's a 1971 LTD silver and a green – that green Monico [sic], whatever the kind of car?
> A. No, it was '74 LTD.

(10/16/12,p1119) On cross-examination, Stackhouse said Clark told him, "He had that car hidden." (*Id.*,p1132-33)

While cross-examining Heidel, Clark showed Heidel a November 4, 1994, newspaper article about Grisham's murder mentioning "a large green two-door older model 1970s Chrysler with silver trim around the bottom." (10/17/12(a.m.),p1238-

40) The article was admitted for the purpose of how it "impacted the statements of [Stackhouse] or another witness." (*Id.*,p1244)[16]

During Clark's case, the prosecution objected:

> …the defense is going to intend to elicit some testimony from Detective Rich Denig that he met with a man named Arman Vandenboss (a[s] heard) and that Mr. Vandenboss gave a description of a car, a Chrysler Regal, that was seen at or around – between essentially 9:00 and 9:30 leaving the scene of the apartment complex. And I think that that testimony, if [counsel] were to elicit that, would clearly be calling for inadmissible hearsay. [Vandenboss] is not here, he's not endorsed by either side, and getting into that testimony would be inadmissible hearsay.

(10/17/12(p.m.),1918-19)

Clark tried to locate Vandenboss for trial, but discovered Vandenboss had died. (*Id.*,p1919) Clark did not intend to elicit Vandenboss's words; rather, counsel wanted to elicit Denig…

> …had information as part of his investigation about a car, and the description of the car, without eliciting where the information came from or the details of the information. Because there's been discussion throughout the trial, including the information in the newspaper and [Stackhouse's] testimony, about different cars and different descriptions that is not a car associated with our client in any way. And just to elicit from [Denig] that he had information about a vehicle, that description, and that they followed up on that description of the vehicle and that that – a car of that description was never tied in any way to our

[16] The article is not in the appellate record, but counsel read its relevant contents into the record, which Heidel affirmed.

> client. So I don't think that it's being offered for the truth of the matter asserted. It's being offered for what the officers did, why they did it and why that description has been out there and, further, to show that it didn't tie to our client.

(*Id.*,p1919-20)

Counsel explained Denig would testify police "went out looking for a vehicle that matched that description," which was consistent with information published in the newspaper in 1994. (*Id.*,p1921) It was necessary to demonstrate why police were looking for a green car, which was not Clark's car, and clear up confusion in the testimony about that fact. (*Id.*,p1921-22) Counsel maintained "the prosecution consistently asked about [Clark's] car and if it was green," potentially confusing jurors and opening the door to clarifying questions about why police searched for a green car. (*Id.*,p1922-24)

The court precluded the testimony, finding jurors would not be confused because the primer on Clark's car was both green and grey. (*Id.*,p1924-25) The court also found Clark's proposed inquiry lacked relevance. (*Id.*)

The court erred. First, the proposed testimony was not hearsay, as the prosecution contended. CRE 801(c)(hearsay is "a statement other than one made by the declarant…offered in evidence to prove the truth of the matter asserted"); *see People v. Tenorio,*590 P.2d 952,958(Colo.1979)(statement offered to explain police

actions or investigation not offered for truth of matter asserted); *People v. Robinson*,226 P.3d 1145,1152(Colo.App.2009).

This Court, following *Tenorio*, found an informant's out-of-court statements leading police to a drug transaction, and to the defendant's arrest, were not offered for truth, but for the "nonhearsay purpose of showing their effect on the listening officers." *Robinson*,1152. *Robinson* found"[i]t is the purpose for which statements are offered, and not the details reflected therein, that determines whether the statements are hearsay." *Id.*

Similarly, federal courts permit testimony explaining police investigation as nonhearsay. *See, e.g.,United States v. Mendez,*514 F.3d 1035,1046(10th.Cir.2008); *United States v. Reifler,*446 F.3d 65,92(2d.Cir.2006)("Background evidence may be admitted to…furnish an explanation of the understanding or intent with which certain acts were performed")(citation omitted); *Robinson*,1152-53(citing cases).

Like *Robinson*, Denig's testimony was offered to show why police took certain investigative steps. The offered testimony was limited in scope, less detailed than in *Robinson*, and did not implicate actual statements of the out-of-court declarant. Accordingly, it was not hearsay.

Second, the testimony was relevant and necessary to clear up confusion created by prosecution inquiries into the color of Clark's car and, more significantly, to rebut prosecutorial implications that Clark's car was sighted driving away from the scene.

The prosecution opened the door to Denig's testimony by asking multiple witnesses about the green coloring on Clark's Mustang. (10/11/12,p718; 10/15/12,p815; 10/16/12,p1119) Weiler, Uhlir, and Stackhouse left the impression a green car was spotted near the scene contemporaneous with the murder. Stackhouse's testimony was particularly problematic, both because the prosecutor prompted Stackhouse to affirm he told police Clark had a green car and because Stackhouse's account of what Clark told him was inconsistent with other evidence about Clark's car, sowing confusion. (10/16/12,p1119,1132-33)

Nonhearsay explaining police investigation can be barred under CRE 403. *Robinson*,1152-53. Here, the court erroneously and cursorily analyzed Denig's proposed testimony for relevance and prejudice. The court merely observed that up to that point, the court did not find the evidence relevant, without explaining why, and the court was not confused by the evidence. (10/17/12(p.m.),p1924)

But the evidence was relevant to Clark's defense that the police focused on him to the exclusion of other leads and possibilities. (*See*, *e.g.*,10/10/12(p.m.),1612-13,1618-19; 10/18/12,p2088-91) Moreover, whether the judge, who lived with this

case through all pretrial proceedings, was confused about the evidence is a different question from whether jurors, lacking legal training and the court's substantial background with the case, may have been confused. The court's blunt dismissal of Denig's explanatory testimony disregarded questions left open without it – namely, the significance of prosecution evidence concerning Clark's car and its coloring.

Further, there was little risk of unfair prejudice, given the prosecution had elicited the testimony about the car's color and had helped foment confusion through Stackhouse's testimony. Denig's testimony would only have clarified why police were looking for an older model green car with silver trim and had not linked Clark's car to that report. (10/17/12(p.m.),p1919-24)[17]

Clark's defense was improperly handicapped. Given this circumstantial case, the unresolved and incorrect implication police linked Clark's car to the homicide likely affected jurors' deliberations and verdict.

The court's error cannot be deemed harmless, let alone harmless beyond a reasonable doubt due to the violation of Clark's due process rights to a complete defense, fair trial, and impartial jury. *See* U.S. Const. amends. VI,XIV; Colo. Const.

[17] The defense was later permitted to ask Trujillo whether he connected Clark to cars besides his Ford Mustang and a Dodge Neon. (10/17/12(p.m.),p2011-14) Trujillo said no. (*Id.*,p2014) This did not explain why the prosecution elicited various details, including coloring, about Clark's Mustang, nor did it remedy confusion sown by the testimony, especially Stackhouse's.

art.II,§§16,23,25; *Taylor*,*supra*,408-09; *Chambers*,*supra*; *Pronovost*,*supra*,558. This Court should reverse.

VII. The Prosecutor Committed Reversible Misconduct in Opening Statement and Rebuttal Argument.

A. Standards.

Claims were preserved by contemporaneous objections where noted. (10/18/12,p2093,2104)

A reviewing court examines prosecutorial misconduct under the circumstances' totality, a mixed factual and legal question that should be reviewed de novo. *Wend*,*supra*,1091,1096(applying facts to authorities, finding prosecutor's argument improper).

Unpreserved claims receive plain error review. Crim.P.52(b). Although deferential, a reviewing court must "not blindly cling to such deference in order to uphold an unjust conviction where prosecutorial misconduct has contaminated the jury's impartiality." *Id.*,1099.

Preserved, non-constitutional error is "harmless only if a reviewing court can say with fair assurance that, in light of the entire record at trial, the error did not substantially influence the verdict or impair the fairness of the trial." *People v. Bowers*,801 P.2d 511,518-19(Colo.1990). Ultimately, numerous improprieties

cumulatively violated Clark's due process rights to a fair trial and impartial jury, mandating reversal. *See People v. McBride*,228 P.3d 216,221(Colo.App.2009).

B. Analysis.

Prosecutors must refrain from improper methods calculated to produce wrongful convictions. *Berger v. United States*,295 U.S. 78,88(1935); *Harris v. People*,888 P.2d 259,263(Colo.1995). This duty is derived from the rights to a fair trial and impartial jury. *Harris*,263; *People v. Oliver*,745 P.2d 222,228(Colo.1987)("Prosecutorial misconduct may influence a jury and deny an accused a fair trial."); *see* U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25. Improper prosecutorial remarks carry "the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*,470 U.S. 1,18-19(1985).

The prosecutor must "refrain from argument which would divert the jury from its duty to decide the case on the evidence." *Harris*,265. Statements "that evidence personal opinion, personal knowledge, or inflame the passions of the jury are improper." *Domingo-Gomez v. People*,125 P.3d 1043,1050(Colo.2005).

Prosecutorial impropriety is exacerbated during rebuttal because it is the last time jurors hear from counsel and therefore foremost in their thoughts. *Id.*,1052(citing *United States v. Carter*,236 F.3d 777,788(6th.Cir.2001)).

1. The prosecutor misstated the evidence and raised an improper character inference about Clark in opening statement.

In opening statement, the prosecutor said:

> [P]eople that come to this trial will describe [Clark] as a guy who had a chip on his shoulder, a guy who had a chip on his shoulder because some people had more than him, some of his classmates, some of his friends were the haves, and he was a have not.

(10/10/12(p.m.),p1604)

This salvo was doubly improper. First, no witness testified Clark "had a chip on his shoulder," or that he had something against "people who had more than him." These concepts lacked evidentiary support.

Second, the statement introduced improper character evidence. CRE 404(a). Indeed, the court barred the prosecutor from eliciting evidence of "Clark's personality" during Uhlir's testimony. (10/15/12,p817)

The prosecution falsely exaggerated evidence of Clark's interest in the Marines:

> [Y]ou'll hear from witness after witness in this trial that Michael Clark wanted to join the Marine Corps so badly he would wear a Marine T-shirt all the time, that he had [a] Marine Corps sticker on his old Jeep, even kept his hair in a high and tight.

(10/10/12(p.m.),p1604)

No witness, let alone "witness after witness," testified Clark wore a Marine T-shirt or had a Marine Corps sticker on his old Jeep. While there was a photo of Clark with a crewcut, no witness testified he "kept his hair in a high and tight," because he wanted to join the Marines.

This exaggerated Clark's interest in the Marines, improperly bolstering the motive theory. The prosecution returned in rebuttal: "He has the T-shirt and the stickers and he tells all of his friends that's his dream." (10/18/12,p2098)

This was plainly erroneous. It is well-established that in opening statement the prosecutor must not misrepresent the evidence to come. *See*, *e.g.*,*Archina v. People*,307 P.2d 1083,1098(Colo.1957)(prosecutor's opening statement "was highly improper, it proved factually untrue, and untrue statements should not be made to jurors and certainly should not be repeated").

Likewise, it is long-settled the prosecutor must not misstate evidence in closing. *People v. DeHerrera*,697 P.2d 734,743(Colo.1985); *accord Domingo-Gomez*,1049. Prohibitions against character evidence are similarly longstanding. *E.g.*,CRE 404; *Stull*,*supra*. Accordingly, the error was obvious.

It was also substantial. The slandering of Clark's character tainted him in jurors' eyes before the first witness. *Spoto*,*supra*,1320(character evidence injects "collateral issues into the case which [were] not unlikely to confuse and lead astray the

jury.”). The repeated invocation of Marine T-shirts and stickers improperly bolstered the prosecution’s theory Clark was fixated on the Marines.

This misconduct likely substantially affected jurors’ deliberations.

2. The prosecutor conveyed personal opinion during rebuttal.

The prosecutor argued Clark’s defense relied on speculation, setting up this:

> I don’t know if on any other occasion [Clark] knew how to handle a gun, but I knew from – but I know from [one] to [two] feet away he was able to hit Marty Grisham four times. That’s what I know and that’s what this evidence shows. And that’s not me speculating, that’s not me saying what might have been.

(10/18/12,p2091-92)

The prosecutor told the jury, “I know from [one] to [two] feet away [Clark] was able to hit Marty Grisham four times. That’s what I know…” This conveyed personal opinion of Clark’s guilt.

The prosecutor said he was not “speculating” or “saying what might have been.” The prosecutor conveyed he *personally knew* Clark was guilty.

Clark did not object, but it is well-established expressions of personal opinion are error. *Domingo-Gomez*,1050(citing authorities); *People v. Estep*,583 P.2d 927(Colo.1978)(prosecutor’s opinions are unsworn, unchecked testimony). The error here was greatly prejudicial, stamping the answer to the trial’s critical question with

"the imprimatur of the Government." *Young*,*supra*,18. The misconduct was obvious and substantial, constituting plain error.

3. The prosecutor improperly aligned himself with the court's authority.

Further, the prosecutor launched this:

> I wish things could be clean and pristine and as orderly as things are in this courtroom. I wish that life could always have a man like Judge Mulvahill.
>
> [Defense("D")]: Objection, Judge.
>
> [Court("C")]: Sustained.
>
> [Prosecutor("P")]: But it's not. This case is not like that, the evidence is not like that, because the evidence is born in the real world and it comes to us from the real world.

(10/18/12,p2093)

Prosecutorial arguments "wrapped in the cloak of state authority" are impermissible. *See People v. Rodriguez*,794 P.2d 965,976-77(Colo.1990)(quoting *Drake v. Kemp,*762 F.2d 1449,1459(11th.Cir.1985))(reading from legal authority improper in capital sentencing). It is likewise improper to invoke State authority to ratify the defendant's guilt. *See Domingo-Gomez*,1052-53(prosecutor improperly referred to governmental "screening process").

Here, the prosecution aligned itself with Judge Mulvahill, implying allegiance. Clark objected.

While the objection was sustained, the court did nothing more to alleviate the misconduct's impact. The prosecutor's foray into the cloak of state authority was particularly problematic here, moments after the prosecutor told jurors "I know from [one] to [two] feet away [Clark] was able to hit [Grisham] four times." (10/18/12,p2091)

This misconduct was not harmless; rather, it continued the prosecutor's string of improper remarks, in rebuttal, conveying a personal belief in Clark's guilt and the State's imprimatur thereon. *Young*,*supra*,18; *Domingo-Gomez*,*supra*,1050-53; *Estep*,*supra*.

4. The prosecutor improperly commented on Clark's truthfulness.

Addressing Clark's 1994 interrogation, the prosecutor opined:

> ...[E]verything he said was untrue. Everything he said was misleading, everything…was designed to steer the police away from his gun, the gun that he purchased. And they told him, We want to clear you or we want to exclude you and we want to give you an opportunity to explain it.
>
> …
>
> [Clark] wasn't telling the truth about when he had it, where he got it and what he did with it, his story was ridiculous, but that's the same old Mike.

(10/18/12,p2096-97)

Prosecutors are prohibited from communicating personal belief in witness veracity. *Domingo-Gomez*,1049; *Wilson v. People*,743 P.2d 415,418(Colo.1987). Counsel

may not "throw onto the scales of credibility the weight of his own personal opinion." *Wilson*,418(quotations, citation omitted).

The prosecutor opined on Clark's veracity. As *Domingo-Gomez* and *Wilson* demonstrate, prohibition of this misconduct is long-established. And the prejudice to Clark was substantial in a case hinging on circumstantial evidence and the jury's perception of his consistent denials of any involvement in Grisham's murder. The comments constituted plain error.

5. The prosecutor improperly appealed to community sentiment and jurors' passions.

The prosecutor also argued:

> The most poignant moment is Stackhouse saying despite what this means to him and despite the lack of benefit, despite the harm coming here to testify is going to do to him, if someone did this to my family –
>
> D: Objection, Judge, completely improper.
>
> C: Overruled.
>
> P: If someone did this to my family, this is his – these are his words not mine, If someone did this to my family, I would want someone to step forward.

(10/18/12,p2104)

A prosecutor may not use arguments intended to inflame jurors' passions. *Domingo-Gomez*,1049; *Oliver*,*supra*,228; *People v. Mason*,643 P.2d 745,752(Colo.1982). It

is improper to appeal to jurors to consider the wishes of the community. *Rodriguez,supra*,977; *Wilson,supra*; *see People v. Fernandez*,687 P.2d 502,506(Colo.App.1984)(improper closing argument on effect of victim's death on family and community); *see also Lee v. State,*950 A.2d 125(Md.App.2008)(argument jury should protect community and clean up streets invoked prohibited "golden rule" argument).

Clark objected to the prosecutor's improper appeal to community sentiment and urging jurors to "step forward" for Grisham's family by finding Clark guilty. The court overruled the objection, leaving the impression in jurors' minds that sympathy for Grisham's family was an appropriate consideration. In this very close, circumstantial case, the error was not harmless.

6. The prosecutor improperly urged the jury to "Do justice" for the victim, do its "hard work," and to "Do justice and make sure that the right thing happens."

In closing, one prosecutor concluded by asking the jurors to "do justice to Marty Grisham." (10/18/12,p2069) Concluding rebuttal, the other prosecutor commended the "hard work" ahead:

> …[I]t's never easy, it's never pretty, it's never beautiful, it's never majestic, it is hard work. It is hard work.
>
> …

> Be proud of the work you are going to do in this case, as hard as it is, as heartbreaking as it may be to hear this evidence and to do what you have to do, be proud, do justice and make sure that the right thing happens.

(*Id.*,p2105-06)

"Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim." *McBride*,*supra*,223; *see also Domingo-Gomez*,1049. A prosecutor's comment that the jurors' role is to "do justice" is flagrantly improper. *See*, *e.g.*,*Young*,*supra*,18(prosecutor's exhortation to jury to "do its job" was erroneous because "that kind of pressure…has no place in the administration of criminal justice"); *State v. Acker*,627 A.2d 170,172-73(N.J.Super.App.Div.1993) (prosecutor committed "egregious" misconduct telling jurors "give them some justice folks," referring to alleged victims; warning jury about not doing its job is one of most egregious forms of prosecutorial misconduct, which alone can deprive defendant of fair trial).

There is no question the prosecutor meant the jury's job was to convict Clark and do justice for a sympathetic victim. This came on the heels of the improper appeal to jurors' emotions, invoking Grisham's family. These themes surely resonated during deliberations.

Although Clark did not object, prohibitions against this misconduct are well-established and the prejudice is severe. *Young*,*supra*; *McBride*,*supra*; *Acker*,*supra*. The concluding remarks constituted plain error.

7. The misconduct constituted reversible, cumulative error.

The misconduct was pervasive and flagrant. The impropriety was further exacerbated because of its prominent place in rebuttal and opening statement. *See Domingo-Gomez*,*supra*,1052(citing *Carter*,*supra*,788); *Archina*,*supra*. The misconduct built up to a final crescendo, improperly urging jurors to "do justice and make sure that the right thing happens" by convicting Clark. (10/18/12,p2106)

This case was exceptionally close. *See* Argument Summary, Issue I, Issue IX. Each instance of misconduct prejudiced Clark and deprived him of a fair trial. Even assuming, *arguendo*, no single instance mandates reversal, the cumulative effect constitutes reversible error under any standard. U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25; *Wilson*,*supra*,419-21; *McBride*,*supra*,221.

VIII. The Court Reversibly Erred in Rejecting Clark's Jury Instruction Correctly Stating Deliberating Jurors Have the Right to Disagree.

A. Standards.

Clark preserved this issue by tendering a jury instruction and arguments during the jury instruction conference. (Supp.Access,p35; 10/17/12(FTR.transcript),p1563-65)

Jury instructions are reviewed de novo. *E.g.*,*Riley v. People*,266 P.3d 1089,1092(Colo.2011). Preserved instructional error of constitutional dimension is reversible unless the State proves it harmless beyond a reasonable doubt. *People v. Miller*,113 P.3d 743,749(Colo.2005).

This error should receive review for constitutional harmlessness because it directly affected Clark's rights to a fair trial, impartial jury, and proof beyond a reasonable doubt. *See* U.S. Const. amends. V,VI,XIV; Colo. Const. art.II,§§16,23,25; *see also Peters v. Kiff*,407 U.S. 493,502(1972)("Due process is denied by circumstances that create the likelihood or the appearance of bias.").

B. Analysis.

Due process protects against conviction except by proof beyond a reasonable doubt and guarantees a fair trial and impartial jury. U.S. Const. amends. V,VI,XIV; Colo. Const. art.II,§§16,23,25; *In re Winship*,397 U.S. 358,364(1970); *Oaks v. People*,371 P.2d 443,447(Colo.1962).

A Colorado defendant is entitled to a unanimous verdict. *E.g.*,§16-10-108,C.R.S.; *People v. Phillips*,91 P.3d 476,479(Colo.App.2004). "Unanimity requires a free and untrammeled deliberative process that expresses the conscientious conviction of each individual juror." *People v. Lewis*,676 P.2d 682,686(Colo.1984).

"A court cannot sanction a verdict which is reached by some members of the jury sacrificing their conscientious opinions merely for the sake of reaching an agreement." *People v. Schwartz*,678 P.2d 1000,1012(Colo.1984)(quotations, citation omitted).

Clark tendered an instruction based on *United States v. Rey*,811 F.2d 1453(11th.Cir.1987):

> While it is true that in a criminal case, any jury verdict must be unanimous, the justice system recognizes that, in some cases, a unanimous verdict is simply not possible. Jurors are never faulted for failing to reach a unanimous decision. One of the safeguards in our system, to make sure that innocent people are not wrongly convicted, is to allow a jury to be hung if all of its members do not agree on a verdict. A hung jury is every bit as much a part of our legal system as is a unanimous verdict.

(Supp.Access,p35; 10/17/12(FTR.transcript),p1563-64) The prosecution objected. (10/17/12(FTR.transcript),p1564)

Clark argued the instruction correctly stated the law, namely that failure to unanimously agree is a permissible outcome. (*Id.*,p1564-65) The court noted it would be willing to read the instruction if the jury deadlocked, but rejected giving it up front, fearing it would discourage deliberations. (*Id.*,p1565) There was nothing to support this ruling, particularly in a case of this length and seriousness.

The court erred. Clark's instruction was both accurate and permissible in Colorado.

A criminal case may terminate with the failure to reach a verdict. *See, e.g.*,*United States v. McElhiney*,275 F.3d 928,935(10th.Cir.2001). "Indeed, a mistrial is as much a part of the jury system as a unanimous verdict." *Williams v. United States*,338 F.2d 530,533(D.C.Cir.1964); *accord United States v. Ayeni*,374 F.3d 1313,1324(D.C.Cir.2004)

Jurors, however, cannot be presumed to know about the possibility of discharge without unanimity. *Huffman v. United States,*297 F.2d 754,758(5th.Cir.1962)(Brown,J.,dissenting)(it is "a basic misapprehension[ ] that a criminal trial must end with (1) a verdict of guilty or (2) a verdict of not guilty"); *see McElhiney*,935(quoting same).

Jurors turn to their instructions for guidance. *E.g.*,*People v. McKeel*,246 P.3d 638,641(Colo.2010)("We presume that jurors follow the instructions that they receive.") The instruction concerning unanimity used in this case, Colorado's pattern instruction, does not contemplate a result other than unanimity. (Supp.Access,p552(jury.inst.16)); COLJI-Crim. 38:04(1993); *accord* COLJI-Crim. E:23(2014).

Rather, the instruction communicates only unanimity is permitted:

> Your foreman will preside over your deliberations *and shall sign whatever verdict you reach*.

> The verdict must represent the considered judgment of each juror. *In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.*

(Supp.Access,p552(jury.inst.16))(emphasis added).

The instruction told jurors the foreman *shall* sign the verdict and the verdict *must* be unanimous. *See*, *e.g.*,*Lehnert v. People*,244 P.3d 1180,1186(Colo.2010)("shall" indicates mandatory task). Under this instruction, jurors would reasonably believe a verdict *must* be reached and deliberations *shall* continue indefinitely until such time. *See*, *e.g.*,*People v. Dunlap*,975 P.2d 723,743(Colo.1999)(appellate court presumes jury understands and heeds instructions).

That, however, is simply not the law. "The jury trial system has not malfunctioned when the jury cannot reach a verdict. One of the safeguards against the conviction of innocent persons built into our criminal justice system is that a jury may not be able to reach a unanimous verdict." *Rey*,*supra*,1460. Clark's instruction utilized *Rey* to remedy the final concluding instructions' shortcomings.

In *Gibbons v. People*,2014 CO 67, and two companion cases, *Martin v. People*,2014 CO 68, and *Fain v. People*,2014 CO 69, our supreme court found it is sometimes appropriate to inform jurors about a mistrial. Specifically, the court held:

> The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is

> given, the instruction will not have a coercive effect on the jury.

Gibbons,¶33. Accordingly, while indicating trial courts should utilize discretion carefully, the court authorized instructing the jury that they may fail to agree.

Moreover, in the *Gibbons* cases, no request was made by the defendant or otherwise for an instruction informing jurors about the possibility of a mistrial. *Id.*,¶12; *Fain*,*supra*,¶17; *Martin*,*supra*,¶14(counsel "suggested 'further instruction' but did not elaborate or provide specific language"). Here, Clark tendered a specific instruction requesting language informing jurors of their right not to agree.

While the *Gibbons* cases occurred in different stages of deliberations, Clark's instruction is just as legally accurate when provided with the initial instructions. The court erred by simply rejecting it based on inclusion with the initial charge.

Indeed, several federal circuits permit instructions in the initial charge emphasizing the jury's right to conscientiously disagree. For example, the First Circuit employs a final instruction on "Reaching Agreement":

> It is important that you attempt to return a verdict, but, of course, only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Pattern Criminal Jury Instructions for the District Courts of the First Circuit(1998), Instruction 6:03(attached Appendix B).

The Seventh Circuit provides a final charge instruction entitled "Unanimity/Disagreement Among Jurors," that includes: "But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors just so that there can be a unanimous verdict." Pattern Criminal Jury Instructions of the Seventh Circuit(2012), Instruction 7.03(attached Appendix C); *see United States v. Brown*,634 F.2d 1069,1070(7th.Cir.1980)("A deadlock instruction given along with other instructions before there is a minority of jurors to feel pressured, has less danger of being coercive than a deadlock instruction first given when deadlock occurs.")

The Eighth Circuit also prefers instructing jurors on their duties to deliberate, including the right not to surrender conscientious convictions, in the initial charge in every case. Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit(2013), Instruction 3.12(attached Appendix D); *United States v. Webb*,816 F.2d 1263,1266,n.4(8th.Cir.1987)(Eighth Circuit prefers providing *Allen* instruction in initial instructions); *but see United States v. Arpan*,887 F.2d 873,876(8th.Cir.1989)(defendant does not have right to initial instruction specifically setting out alternative of no decision).

Clark's tendered instruction is well-supported. The court's concern with the timing of the instruction was an insufficient reason to reject it, constituting error.

Clark's jury deliberated over three days. Deliberations began on Thursday, continued through Friday, and broke for the weekend. The jurors returned the verdict after continued deliberations Monday. This evidences a strong likelihood of disagreements. The jurors, however, were not properly instructed they had the right to maintain disagreements.

The error cannot be deemed harmless, let alone harmless beyond a reasonable doubt. There is at least a reasonable possibility had the court given Clark's instruction, the result would have been different. *See Leonardo*,*supra*,1257(citing *Chapman v. California*,*supra*,23-24).

This Court should reverse.

IX. Cumulative Error Deprived Clark of a Fair Trial and Impartial Jury.

"Numerous irregularities, each of which standing alone is insignificant, may, when taken together, so affect the substantial rights of a defendant as to require reversal." *People v. Gibson*,203 P.3d 571,578(Colo.App.2008); *see United States v. Rivera,*900 F.2d 1462,1469-70(10th.Cir.1990)(cumulative error analysis aggregates errors to determine if reversal is required; "The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.") Clark's fair trial rights were violated by erroneous

admission and exclusion of evidence, prosecutorial misconduct, and rejection of his tendered instruction.

No one saw the shooter, police never found the murder weapon, and evidence against Clark was thin and circumstantial. Even assuming, *arguendo*, the prosecution's timeline, there was an extremely narrow window in which Clark could have conceivably committed the crime. No evidence was recovered in searches of Clark, the house where he stayed, or his car. The DA did not deem the evidence sufficient to file charges for 17 years.

The key evidence came from the mouths of a snitch, a six-time felon and cocaine addict with strong personal motivations to provide information, and another career felon who was offered a plea deal to dismiss pending cases. (10/16/12,p1109-23,1135-40; 10/16/12(p.m.),p1785-93; 10/15/12,p906-12,920-32,947-48,955-58; D.Ex.A); *see* Facts, Issues I, IV.

Stackhouse, the convicted false reporter to police (among many crimes), was the only witness who testified Clark made admissions about the homicide – and even Stackhouse's version was ambiguous at best. Moore, a veteran gun-trafficker, was critical to the prosecution's narrative linking Clark to a handgun, never located, which was a merely theoretical murder weapon. Moore was the only witness who said Clark took the larger Bryco-Jennings, the theoretical murder weapon, and his testimony may

have been protecting his self-interest. Moore also was the only witness whose testimony implied – only by inference, not eyewitness account, and far from definitively – that Clark had a gun on November 1, 1994.[18] (10/15/12,p932-34,975-76,985-86)

The prosecution's case rested largely on motive, argued in opening, closing, and rebuttal. (10/10/12(p.m.),p1604-06,1611-12; 10/18/12,p2043-44,2059-63,2093-95,2098-99,2105) But the motive theory relied on inadmissible evidence (Issue III), improper argument (Issue VII), and made no sense. Clark did not conceal the forgery – he used his real name on every check. (10/12/12,p1716-20; P.Ex.61) And Weyer testified Clark's Marine eligibility likely ended before the forgery. (10/15/12,p867-70,882,893)

Meanwhile, Jerome saw an unusual, scary man at the building just before the murder. (10/17/12(p.m.),p1932,1947) She had never seen the man before and never saw him again. (*Id.*,1926-33,1945) And, as officers told Clark in 1994, KG and LG had compelling motives. (P.Ex.59,1:52:15-1:55:50)

[18] Moore testified he was with "Summer" and "Vanessa," on November 1, and that Clark and Uhlir dropped the three of them off at the bus station before Clark and Uhlir went to the soccer game. (10/15/12,p932-34,975-76,985-86) Moore did not recall seeing Clark with a gun, but Vanessa was "freaking out," and he thought she may have seen a gun. (*Id.*) Although Heidel tracked Vanessa and Summer down, the prosecution presented neither. (10/17/12,p1254,1258)

The court's numerous errors and the prosecutor's misconduct improperly tipped the scales against Clark. *See*, *e.g.*,*Walker v. Engle*,703 F.2d 959(6th.Cir.1983)(numerous errors cumulatively denied fundamental fairness). Even if, *arguendo*, no single error merits reversal, the aggregate effect of numerous errors cumulatively denied Clark his rights to a fair trial and impartial jury. *See* U.S. Const. amends. VI,XIV; Colo. Const. art.II,§§16,23,25; *Rivera*,*supra*; *Gibson*,*supra*.

CONCLUSION

Michael Clark requests that this Court vacate his conviction. Alternatively, Clark requests that this Court reverse and remand to the district court.

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CERTIFICATE OF SERVICE

I certify that, on April 16, 2015, a copy of Michael Clark's Second Amended Opening Brief was electronically served through ICCES on Catherine P. Adkisson of the Attorney General's Office.