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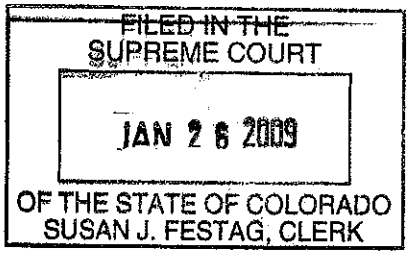
SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Certiorari to the Colorado Court of Appeals Case No. 06CA930 District Court, Adams County, 05CR1417	
RYAN YUSEM Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	σ COURT USE ONLY σ
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MR. YUSEM'S OPENING BRIEF

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INTRODUCTION

Petitioner was the defendant in the trial court and will be referred to by name or as the Defendant. Respondent, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal.

ISSUE ANNOUNCED BY THE COURT

Whether the court of appeals erred in upholding the trial court's admission of prior act evidence because, as the dissenting judge correctly concluded, the prior act evidence had no relevance independent of an inference of bad character and was unfairly prejudicial?

STATEMENT OF THE CASE

On May 11, 2005, Ryan Yusem, who was then a deputy with the Denver Sheriff's Department, was charged in the Adams County District Court with two counts of felony menacing[1] and two counts of prohibited use of a weapon.[2] (v1, p1-3) A jury trial was held February 6-8, 2006. (v8, p4; v9, p3; v10, p2) The trial court dismissed two counts upon Mr. Yusem's motion for judgment of acquittal. (v9, p3-4) Of the remaining two counts, the jury convicted Mr. Yusem only of felony menacing.

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[1] Section 18-3-206(1)(a)/(b), C.R.S. (2008), a class five felony.
[2] Section 18-12-106(1)(a), C.R.S. (2008), a class two misdemeanor.

(v1, p58-59; v10, p4) On April 3, 2006, the district court sentenced Mr. Yusem to serve a term of two years supervised probation. (v1, p61; v11, p6)

On appeal the court of appeals affirmed the judgment of conviction in a split decision. The majority acknowledged that "the question is very close" but nevertheless upheld the trial court's admission of a prior bad act under CRE 404(b), finding that the evidence was relevant and not unfairly prejudicial. Slip op. p6-8. Judge Dailey, in his dissent, found that the evidence was not relevant for any permissible purpose and moreover, was significantly and unfairly prejudicial. Slip op. p13-15.

STATEMENT OF THE FACTS

On April 6, 2005, Mr. Yusem, a Denver Deputy Sheriff, was off duty and went out to dinner with his ex-wife, Vinchenza Burney, who is a Westminster police officer, and their two young daughters (though Mr. Yusem and Ms. Burney ended their marriage, they continued to live together). (v9, p30-31, 33) When they returned home to the Hyland Park Center Apartments in Federal Heights, their neighbor, Wendy Kotzmoyer, barefoot and dressed in her nightclothes, came running out to their car. (v9, p33, 48) Ms. Kotzmoyer was quite agitated and upset and told them, "It's going down tonight." She told them a cocaine deal was going to occur in front of her apartment (which was on the first floor directly below the Yusem's third floor

apartment) and that either a black or white SUV would be involved. (v9, p20, 33-34) Ms. Kotzmoyer wanted them, because they were police officers, to do something to stop it. (v9, p21-23, 25-26, 33-34)

Ms. Kotzmoyer had first approached them about the problem of drug activity in the apartment complex two days earlier. (v9, p30-32) Ms. Kotzmoyer had witnessed her ex-brother-in-law Steve lose everything—his home, his business, two cars—due to his involvement with cocaine, and she was frightened because he had told her that the dealer was armed and dangerous and would shoot her if she intervened. (v9, p21-22, 32, 37-38) Ms. Burney had discussed the problem with her training officer and they had determined that it would be best to wait to do anything until they had more information. (v9, p32)

On the night of this incident, Ms. Kotzmoyer had learned of the imminent drug deal because Steve was at her apartment waiting for the drug dealer. (v9, p21-22, 27) Ms. Kotzmoyer testified that she "practically begged [Mr. Yusem] to stop this drug dealer." (v9, p22) Mr. Yusem told her that it was out of his jurisdiction and that she should "call 911," but Ms. Kotzmoyer indicated that she could not because Steve was in her apartment. (v9, p22, 23-26, 29) Ms. Burney told her that they would watch the parking lot and try to get license plate numbers of the suspect vehicles and would pass that information on to the appropriate police department. (v9, p34)

Later, at about 8:45 p.m., Mr. Yusem was out on his balcony when he observed a large white SUV circling the parking lot slowly and periodically stopping in such a way that Mr. Yusem felt he was being watched by the occupant. (v9, p49-51) After about five minutes of this, the SUV left the parking lot. (v9, p51) Mr. Yusem testified that he assumed it was probably the drug dealer and he began to feel "scared." (v9, p51) Nevertheless, he still had to take his dogs out for a walk before he could stay in for the night. (v9, p53) As a deputy sheriff with a concealed weapons permit, Mr. Yusem habitually carried his gun even while off-duty and was therefore already armed, but because of his concern about the potentially armed drug dealer, he took the extra precaution of putting on his bulletproof vest before he went outside. (v9, p54)

When he got out to the parking lot with the dogs, Mr. Yusem saw that the SUV had returned and was creeping around the parking lot. Again Mr. Yusem felt that the occupant of the SUV was watching him. (v9, p57-59) He hustled his dogs toward the playground and then looked back to see the SUV leaving the parking lot. (v9, p59) Mr. Yusem continued through the playground area to the fire lane, which borders a wooded area where his dogs could be off leash and relatively safe. (v9, p60)

The lighting there was poor, however, and Mr. Yusem was still nervous due to the night's events. (v9, p61) When he noticed a vehicle parked some distance away in

the fire lane and a person leaning into the car talking, Mr. Yusem thought, "great, now here's a drug deal going down over there." (v9, p61) While his dogs were running around, Mr. Yusem kept an eye on the parked vehicle and continued to be on the lookout for the white SUV as well. (v9, p62) He was uneasy because the fire lane was in an "out-of-the-way area" and was not well-lit. (v9, p62) Moments later, while he was paying attention to his dogs, he heard the sudden "whine" of an engine and turned to see the vehicle coming right at him at what appeared to him to be a high rate of speed. (v9, p63, 64) In fear for his life, Mr. Yusem drew his weapon and "started screaming, Denver sheriff's department, stop the vehicle; stop the vehicle." (v9, p63-65, 66, 68, 103) When the vehicle came to a stop and was about three to five feet from him, Mr. Yusem yelled at the car to "back the fuck up." (v9, p63, 67-68) In the dark Mr. Yusem still could not see the occupants of the car but heard a male voice yell, "I'm from maintenance." (v9, p63-64, 68) Because he could not discern who was in the vehicle and still thought the occupants might be armed drug dealers, Mr. Yusem said, "I don't care who you're with, just back your vehicle up now." (v9, p63, 65) After the driver complied, Mr. Yusem called the nonemergency line for the Federal Heights police department and made a report. (v9, p63, 71, 96, 107)

It turned out that the driver of the vehicle was in fact a maintenance worker, Correy Longsine, though that night he was driving his own personal unmarked vehicle

rather than the golf cart that the apartment complex's maintenance workers customarily use. (v8, p117, 120-132; v9, p68-69) Frightened by the encounter with Mr. Yusem, he too reported the incident. (v8, p132, 136)

SUMMARY OF THE ARGUMENT

The court of appeals erred in upholding the trial court's admission of prior act evidence because, as the dissenting judge correctly concluded, the prior act evidence had no relevance independent of an inference of bad character and was unfairly prejudicial.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S ADMISSION OF PRIOR ACT EVIDENCE BECAUSE, AS THE DISSENTING JUDGE CORRECTLY CONCLUDED, THE PRIOR ACT EVIDENCE HAD NO RELEVANCE INDEPENDENT OF AN INFERENCE OF BAD CHARACTER AND WAS UNFAIRLY PREJUDICIAL.

A. Applicable Facts

1. The 404(b) Notice and Objection

Prior to trial the prosecution filed a notice of intent to introduce evidence of "other acts" pursuant to CRE 404(b). (v1, p16) The notice indicated that the

prosecution wished to introduce evidence that Mr. Yusem once went to the office of the manager of the apartment complex in which he lived to request that he be given "a new unit" and that he did so dressed in "civilian clothes, but wearing his firearm." (v1, p17) The notice further indicated that the prosecution intended to call the manager, Karen Eckhardt, to testify that Mr. Yusem's firearm was "prominently displayed on the outside of his clothing" and that she perceived that Mr. Yusem "was attempting to intimidate her with his bearing, words, firearm and general demeanor." (v1, p17) Finally, the prosecution's notice stated that it wished to introduce this evidence "to establish the defendant's guilty state of mind, motive, knowledge, identity, opportunity, lack of fabrication, and that the defendant acted knowingly and in the absence of mistake or accident." (v1, p18)

Mr. Yusem filed a written objection, noting that the prosecution had failed to articulate any precise evidential hypothesis by which the proffered evidence would be relevant. (v1, p20-23) Mr. Yusem's objection argued that the incident was irrelevant except for the forbidden purpose of demonstrating propensity and was therefore inadmissible. (v1, p20-23)

2. The 404(b) Hearing

At the November 17, 2005 hearing on the matter, the prosecutor acknowledged that the alleged prior incident occurred in July 2004, almost a year

before the current incident. (v6, p5) The prosecutor argued that the incident "is probative as to the defendant's actions on April of '05 in that it certainly counters the defendant's own statement that 'I was simply following training.' It certain (sic) counters the asserted defense of self-defense. It certainly shows – it goes to a relevant point, that being, what is his intention on that day at that time. And it certainly goes to show that he certainly was acting – a jury could use it to say he was acting in a manner to bully or intimidate as opposed to acting in self-defense or in response to his training." (v6, p6)

The prosecutor conceded that there was no evidence that in the current incident Mr. Yusem knew that the driver of the car he halted was a maintenance worker employed by the apartment complex. (v6, p6) But, he argued, "[T]he defendant's actions back in July of '04 certainly go to, like I said, rebut the asserted defense, the defendant's statement and certainly are probative of how he acted, that he was acting knowingly and again not as part of his training." (v6, p6-7)

Defense counsel argued that the evidence did not meet the test this Court set forth in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). (v6, p17) He asserted that the evidence proffered by the prosecutor established, if anything, only Ms. Eckhardt's *perception* of the prior incident, not Mr. Yusem's intent. Defense counsel pointed out that there was "no real evidence of any overt action by Mr. Yusem." (v6, p18) The

only allegation was that Mr. Yusem was angry and that he was wearing his sidearm when he met with Ms. Eckhardt about his apartment. There was no allegation that he drew his weapon or referred to it in any way. There was no allegation to support any relationship at all between the fact that Mr. Yusem was wearing his sidearm and the fact that he was angry during his conversation with her about the state of his apartment. The only allegation was that because of these two facts, Ms. Eckhardt felt intimidated. (v6, p18)

Defense counsel also pointed out that the only similarity between the prior and the current incidents is that Mr. Yusem was wearing his weapon during both. (v6, p19-20) The first incident did not involve any action with the gun and did not involve an encounter in which Mr. Yusem claimed he acted in self-defense. Defense counsel argued that, therefore, there was nothing about the prior incident that was logically relevant to the current incident. Moreover, he asserted, the evidence of the prior incident was unduly prejudicial. (v6, p20-25)

The prosecutor conceded that Mr. Yusem did not draw his weapon in the first incident but responded that the evidence was relevant nevertheless to show that Mr. Yusem was a bully:

> [The jury] could just believe that he was bullying this person. He wanted that car to stop. The car didn't stop. He pulled out a gun and by golly he made that car stop. And to the extent that this is – can be seen as bullying or

> using a weapon to intimidate or using a weapon to get what he wants, it is certainly a relevant fact as to whether or not he was placing or attempting to place someone in fear. And even though he did not pull a weapon on the apartment manager, the fact that it is there and that – she will testify that through his bearing and through his actions and including the prominent display of the weapon … she felt he was using his status as an officer and his side arm in a way to intimidate and bully her.

(v6, p30) The prosecutor added that the evidence of the prior incident was relevant to rebut the asserted affirmative defense of self-defense: "[I]t is logically relevant if we're talking about, you know, bullying versus you acting as an appropriate police officer. So it's logically relevant to the elements of the case and the jury is going to have to decide." (v6, p31)

3. The Trial Court's Ruling

The trial court[3] ruled that the evidence was permissible. The court found that the evidence demonstrated that Mr. Yusem had a "pattern of behavior," which consisted of "using a firearm in a manner to intimidate" and that this was logically relevant "under the prosecution's hypothesis of modus operandi or scheme or plan or absence of mistake or accident to use a weapon in such a manner as to place others in fear of serious bodily injury." (v6, p39-41) The trial court then concluded that the

[3] Judge Moss presided over the motions hearing. Chief Judge Bockman presided over the trial.

relevance was independent of the inference of bad character: "The pattern which has been articulated is, as I've described, using a firearm in a manner to intimidate and for the reasons described under the rule, I'm allowed by the rule, and so I do find that there is independence of inference from bad character." (v6, p41) The court also found that the probative value of the evidence was not outweighed by the danger of unfair prejudice because "the defendant isn't admitting any wrongdoing either in the prior act or that in the event charged." (v6, p42) The court stated, "In this case where we're dealing with a claim of self-defense and a claim of training in a menacing Class 5 felony context, I believe the evidence of the event with the apartment manager should be allowed under 404(b) and that the relevant evidence, admission of the relevant evidence is not substantially outweighed by any danger of unfair prejudice, confusion of the issues or misleading of the jury." (v6, p43)

4. The 404(b) Instructions

On the morning of trial, the prosecutor submitted a jury instruction to be provided contemporaneously with Ms. Eckhardt's testimony. (v8, p9) Defense counsel objected to the wording of the instruction generally, and particularly objected to the portion that told the jury they could consider Ms. Eckhardt's testimony to establish that Mr. Yusem did not act in self-defense. (v8, p9-11) The trial court noted

that this Court has indicated that 404(b) evidence can be used to rebut the existence of self-defense and overruled the objection without further analysis. (v8, p166)

The instruction, which was provided both contemporaneously with Ms. Eckhardt's testimony and in the final instructions, informed the jury that they could use her testimony "as evidence for one or more of the following purposes: (1) to establish the defendant's state of mind, motive, or knowledge on April 6, 2005; (2) to establish that the defendant acted in the absence mistake (sic) or accident on April 6, 2005; and (3) to establish that the defendant did not act in self-defense on April 6, 2005." (v1, p50; v8, p174)

5. The Testimony at Trial Concerning the Prior Act

Ms. Eckhardt testified that in July 2004 she was being trained to take over management of the Hyland Park Center apartment complex when Mr. Yusem came into the office to speak with the acting manager. (v8, p175) Ms. Eckhardt testified that "[w]hen he came in, he was very angry, plain clothes, he did have a gun on his hip, and he was very angry. He wanted out of the apartment he was in." (v8, p175) According to Ms. Eckhardt, Mr. Yusem was wearing "everyday clothing" with a tucked-in shirt and the gun was visible. (v8, p175-176) "He was yelling, he was stating that the apartment that he was in was unfit to live in. He was very agitated." (v8, p176) She stated that Mr. Yusem did not display a badge, did not mention his

gun, and did not touch his gun during this incident. (v8, p176-178) Nevertheless, Ms. Eckhardt testified that she felt intimidated because he was yelling and because the gun was there. (v8, p176) On cross-examination Ms. Eckhardt testified that she learned later that Mr. Yusem's apartment had water leaks and water damage and that was what he was complaining about. (v8, p178)

6. The Prosecutor's Closing Argument

The prosecutor used Ms. Eckhardt's testimony to his advantage in closing argument, asserting that "it's important on several levels." (v9, p177) First, he argued that by wearing his gun unconcealed Mr. Yusem was violating Denver Sheriff's Department policies.[4] (v9, p177) Second, the prosecutor argued that the incident with Ms. Eckhardt established Mr. Yusem's state of mind during the current incident and established that he did not act in self-defense because it established instead that Mr. Yusem used his weapon to intimidate and control in the current incident just as he had in the prior incident:

> Instruction No. 17 states the purposes for which you can consider that interaction between Ryan Yusem and Karen Eckhardt. And you can consider that evidence to establish Mr. Yusem's state of mind, motive or knowledge on April 6, 2005; the absence of mistake or accident on April 6, 2005; or the fact that he did not act in absence –

[4] Defense counsel's objection to this assertion was sustained because there had been no evidence presented on this point. (v9, p177-178)

> I'm sorry, that he did not act in self-defense on April 6, 2005.
>
> *How does that play into his state of mind almost a year later?* Because Ms. Eckhardt testified from the witness stand that she felt intimidation, and she felt intimidation because of the weapon. Mr. Yusem, even though she testified that he did not mention, touch, draw, point or do anything with that weapon other than have it on his hip in July of 2004, *that weapon was used to intimidate and that weapon was used to control exactly as it was on April 6, 2005. And that's how you should consider that evidence.*

(v9, p178)

B. Law and Analysis

1. Standard of Review

A trial court's decision to admit evidence under CRE 404(b) is reviewed for an abuse of discretion. *Masters v. People,* 58 P.3d 979, 996 (Colo. 2002).

2. Applicable Law

Under CRE 404(b), evidence of an accused's other crimes, wrongs, or acts is not admissible to prove the character of a person in order to demonstrate his propensity to commit the offenses in question or to show that he acted in conformity with that character. CRE 404(b); *Masters v. People,* 58 P.3d at 995; *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). This rule goes to the heart of due process. U.S. CONST. amends. V, XIV; COLO. CONST. art. II, § 25. The right to a trial by an impartial jury guarantees an accused "a fair verdict, free from the influence or poison of evidence

which should never have been admitted, and the admission of which arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury." *Oaks v. People,* 150 Colo. 64, 371 P.2d 443, 447 (1962).

Evidence of other crimes, wrongs, or acts of the defendant may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. CRE 404(b); *People v. Rath*, 44 P.3d 1033, 1038 (Colo. 2002); *People v. Willner,* 879 P.2d 19, 26 (Colo. 1994). Under certain circumstances, such evidence may be admissible to rebut an accused's claim that he acted in self-defense. *Douglas v. People*, 969 P.2d 1201 (Colo. 1998) (where defendant was charged with felony menacing for pointing a loaded gun at two individuals and claimed self-defense, evidence of two prior incidents in which defendant had brandished a gun at individuals without provocation or danger to himself was admissible); *People v. Willner, supra* (where defendant claimed self-defense after being charged with murder for shooting victim who was attempting to repossess defendant's car, evidence that defendant had twice before shot at individuals attempting to take something from him was admissible).

To be admissible, however, the prosecution must articulate a precise evidential hypothesis by which a material fact can be permissibly inferred from the prior act independent of the use forbidden by CRE 404(b). *People v. Spoto,* 795 P.2d at 1318. It

is not sufficient for the party seeking admission of the other act evidence to merely list the litany of permissible uses for such evidence. *Masters v. People*, 58 P.3d at 996.

In *Spoto*, this Court provided a specific analytical framework to evaluate whether evidence of other acts should be admitted. The required analysis consists of four parts. The trial court must find: (1) that the evidence relates to a material fact, *i.e.,* a fact that is of consequence to the determination of the action; (2) that the evidence is logically relevant, *i.e.,* does it have any tendency to make the existence of the material fact more or less probable than it would be without the evidence; (3) that its logical relevance is independent of any intermediate inference, prohibited by C.R.E. 404(b), that the defendant has a bad character, which would then be employed to suggest the probability that the defendant committed the crime charged because of the likelihood that he acted in conformity with his bad character; and (4) that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. *People v. Garner,* 806 P.2d 366, 373-374 (Colo. 1991); *People v. Spoto,* 795 P.2d 1314, 1318 (Colo. 1990).

3. The Trial Court's Error

The trial court failed to properly apply the four-part test. Its ruling reflects a fundamental misunderstanding of CRE 404(b) and the test for admissibility of other act evidence. (v6, p39-43)

The court found that the evidence of the prior incident related to the material fact of "whether the defendant knowingly placed or attempted to place another person in fear of serious bodily injury by use of a deadly weapon." (v6, p39-40) In analyzing the second prong of the test, the court found that the prior incident demonstrated that Mr. Yusem had a "pattern of behavior," which consisted of "using a firearm in a manner to intimidate" and that this was logically relevant "under the prosecution's hypothesis of modus operandi or scheme or plan or absence of mistake or accident to use a weapon in such a manner as to place others in fear of serious bodily injury." (v6, p39-41) The trial court then concluded that this logical relevance was independent of the inference of bad character: "The pattern which has been articulated is, as I've described, using a firearm in a manner to intimidate and for the reasons described under the rule, I'm allowed by the rule, and so I do find that there is independence of inference from bad character." (v6, p41)

The court's finding regarding the prior incident's relationship to a material fact in the current case is not supported by the record. To begin with, Mr. Yusem did not dispute that he knowingly placed or attempted to place the driver in fear. Rather, he claimed that he did so in order to protect himself from what he perceived to be an imminent threat from the vehicle.

Even if this issue was contested, the evidence of the prior incident did not relate to a material fact in the current case. The two acts are completely dissimilar. Ms. Eckhardt's testimony does not support a conclusion that Mr. Yusem knowingly used his weapon to intimidate her (or anyone else) during the prior incident. Nothing about the prior incident shows that Mr. Yusem knowingly or intentionally placed her in fear. It was undisputed that he did not touch his weapon or refer to it in any way during the prior incident. Ms. Eckhardt testified that she was intimidated by its mere presence. There was no evidence that Mr. Yusem knowingly triggered those feelings and perceptions by his actions. Therefore, the court's characterization of the prior incident is inaccurate and unfair and its conclusion concerning the first prong of the *Spoto* test is wrong.

Regarding the second and third prongs of the test, the trial court's conclusion that the prior incident was relevant independent of the forbidden inference was based on its finding that the evidence of the prior incident establishes that Mr. Yusem engaged in a "pattern of behavior", which consisted of using guns to intimidate others, and that this pattern of behavior made it more likely that on April 6, 2005, he had used his gun, not in self-defense, but just to intimidate Mr. Longsine.

But, as the dissenting judge correctly observed, "[a] single other incident does not a pattern make." Slip op. at 13. Thus, to the extent the trial court based its ruling

on the doctrine of chances, it was mistaken. *See People v. Spoto*, 795 P.2d at 1318-1319 (where defendant in murder case asserted shooting was accidental and in self-defense, evidence of a single prior incident in which defendant in dissimilar circumstances had pointed a gun at another was not admissible); *cf. Douglas v. People*, *supra* (to rebut defendant's claim of self-defense in menacing case, evidence of two prior incidents in which defendant had brandished a gun at individuals without provocation or danger to himself was admissible); *People v. Willner, supra* (where defendant claimed self-defense after being charged with murder for shooting victim who was attempting to repossess defendant's car, evidence that defendant had twice before shot at individuals attempting to take something from him was admissible to establish his criminal intent). Contrary to the trial court's conclusion that this articulation of relevance is *independent* of the forbidden inference, this is in fact a finding that Mr. Yusem had a propensity to intimidate others with a weapon and therefore, probably acted in conformity with that propensity on April 6, 2005. In other words, it is an articulation of relevance that *depends* on the forbidden inference.

A trial court abuses its discretion in admitting evidence of prior acts if the logical relevance of the evidence depends on the inference that the defendant acted in conformity with bad character. *People v. Cooper,* 104 P.3d 307 (Colo.App.2004). Because the evidence of the prior incident had no relevance independent of the

forbidden inference, the trial court's conclusion that the evidence met the second and third prongs of the test was wrong.

The court also failed to properly weigh the probative value of the evidence against the danger of unfair prejudice caused by the admission of the evidence. The court merely concluded, without analysis, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant. (v6, p43) This too was error.

4. The Court of Appeals' Error

The majority recognized that the trial court's analysis was erroneous and did not rely on it to uphold the trial court's ruling. Slip op. at 6. Instead, the majority conducted its own analysis and concluded that the evidence of the prior incident was "logically relevant to defendant's intent in pulling his weapon out of his holster" and that this logical relevance was independent of the prohibited intermediate inference of bad character because "[t]he fact that defendant displayed his weapon when angrily confronting the apartment manager is probative of defendant's reasonable beliefs regarding the use of force." Slip op. at 6-7. The majority further found that this evidence "was useful to assist the jury in determining whether defendant believed the degree of force he used was reasonably necessary" and, therefore, "[a]ny unfair

prejudice was plainly outweighed by the probative worth of the evidence." Slip op. at 8.

The majority's analysis is no less erroneous than the trial court's, though the error is not as immediately obvious. First, the majority erred in concluding that the first and second prongs of the *Spoto* test were satisfied because the prior incident was logically relevant to Mr. Yusem's intent in pulling his weapon. Mr. Yusem's intent was not in dispute. As the dissent noted, "[n]o one disputed that, in the present case, [Mr. Yusem] knowingly placed the victim in fear; the issue was, whether defendant's action was justified by a perceived need to act in self-defense." Slip op. at 14-15.

Second, the majority erred in concluding that the logical relevance of the evidence was independent of the prohibited inference because it was "probative of defendant's reasonable beliefs regarding the use of force." Slip op. at 7. Mr. Yusem's general beliefs regarding the use of force are not directly relevant to any issue in this case. While it might be inferred from the prior incident that Mr. Yusem believes it is reasonable to display his weapon to intimidate or bully another, the only possible relevance this belief has to the current case *depends entirely on the employment of an additional inference*—the prohibited intermediate inference that Mr. Yusem has a bullying character and therefore, likely used his weapon in this instance to bully the victim rather than to defend himself. As the dissent correctly concluded, "[b]ecause

defendant did not on that [prior] occasion touch or overtly threaten to use his firearm or claim that he was defending himself, the prior incident appears relevant to show but one thing, that is, that because defendant bullied someone on an earlier occasion, he most likely bullied the victim on this occasion too. This, in my view, amounts to the impermissible use of a bad act to prove that defendant later acted in conformity with a bad character trait." Slip op. at 13-14.

Finally, the majority erred in concluding that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Slip op. at 7-8. Contrary to the majority's conclusion, the evidence of the prior incident had scant, if any, probative value, and none apart from the forbidden inference urged by the prosecutor, i.e., that Mr. Yusem was a bully and had acted accordingly on April 6, 2005. The only contested issue was whether Mr. Yusem had acted reasonably in self-defense when he drew his weapon and commanded the driver to stop the vehicle. The fact that Mr. Yusem, while wearing his gun, had yelled at an apartment manager a year earlier because his apartment was unfit for occupation did not make it any more or less likely that he had acted in self-defense on the night he was faced with a moving vehicle coming toward him in the fire lane. As the dissent concluded, "the prior incident shed no light on whether defendant acted in self-defense in the present case." Slip op. at 15.

The danger of unfair prejudice from the admission of the earlier incident, however, was great. Mr. Yusem testified and his credibility regarding his claim of self-defense was a key issue for the jury. If the jury believed him when he said he pulled his weapon because he was in fear for his life, then he would be acquitted. The court's admission of the prior incident evidence, coupled with the instruction telling the jury that they could use the evidence to establish that Mr. Yusem had not acted in self-defense, unfairly undermined Mr. Yusem's credibility and self-defense claim. Moreover, the prosecutor's closing argument directing the jurors that they *should* consider the prior incident as evidence that Mr. Yusem had not acted in self-defense in the current case but rather, had used his weapon to "intimidate" and "control" encouraged jurors to decide the key issue by relying on propensity evidence. As the dissent noted, "the effect of the prior incident was to portray defendant as a bully and give the jury a substantial reason, unrelated to the merits of the charged offense, to find him worthy of punishment." Slip op. at 15.

In sum, the admission of this unfairly prejudicial evidence violated Mr. Yusem's state and federal rights to due process and fair trial. U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, § 16, 25. Accordingly, the majority erred in upholding the trial court's ruling and affirming Mr. Yusem's conviction.

CONCLUSION

For the foregoing reasons and authorities, Mr. Yusem respectfully requests that this Court reverse his conviction and remand this case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on January 26, 2009, a copy of this Opening Brief was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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