Certification of Word Count: 9,434

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT MAR - 6 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 06CA930	▲ **COURT USE ONLY** ▲
RYAN YUSEM, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent..	Case No.: 08SC526
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PEOPLE'S ANSWER BRIEF

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STATEMENT OF THE CASE

The Charged Offense

Petitioner, Ryan Yusem, appeals from his conviction, upon a jury verdict, of menacing (F-5). On April 3, 2006, he was sentenced to a 2-year term of probation.

The Direct Appeal

In his direct appeal, Mr. Yusem raised two claims: (1) his state and federal constitutional rights to due process and a fair trial were violated when the trial court erroneously admitted irrelevant and unfairly prejudicial evidence; and (2) his state and federal constitutional right to present a defense was violated when the trial court improperly limited the testimony of Mr. Yusem's expert witness.

The court of appeals upheld the conviction, with one judge dissenting. People v. Yusem, No. 06CA930 (Colo. App. May 15, 2008) (Not Published Pursuant to C.A.R. 35(f)).

Issue Presented for Certiorari Review

This court granted certiorari on the following issue:

> 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.

The question presented involves the propriety of the trial court's decision to admit evidence of another act committed by Mr. Yusem, 9 months prior to the charged offense. Specifically, this court must assess the relevance of the other act evidence and the relationship between the probative value of the evidence and its potential for unfair prejudice to Mr. Yusem.

Relevance and prejudice determinations are highly fact-specific, contextual inquiries, influenced by the charged crimes, the evidence admitted at trial, and by the competing theories of the case – including the assertion of self-defense. Accordingly, the People's brief includes a lengthy and comprehensive discussion of the significant facts, procedural history, and arguments of trial counsel pertinent to the issue before the Court.

STATEMENT OF FACTS

The People's Evidence

Correy Longsine was a maintenance worker at the Highland Park Center apartment complex in Adams County, Colorado. (v.8, p.117-119). On April 6, 2005, Mr. Longsine was driving his mini-van with his wife and 2-year-old son as passengers. (Id., p.120). Mr. Longsine testified that he pulled into the fire lane/concrete walking path where he could get close to his apartment so that his

wife could take their son to the bathroom. (Id., p.121). It was approximately 9:00 p.m., and Mr. Longsine had his headlights on. (Id.).

Mr. Longsine explained that he stopped in the fire lane and chatted with a co-worker for three or four minutes through the passenger side window of the mini-van. (Id., p.123-124). After talking to his friend, Mr. Longsine testified that he "let off the brake" and the mini-van started rolling westward down the fire lane/path. (Id., p.129). He estimated that he was going 4 or 5 miles per hour (mph). (Id.).

Mr. Longsine testified that he saw a man walking on the path with three dogs, about 90 feet away from him. (Id., p.129-130). Mr. Longsine explained that the man "laid one of his dogs down in the middle of the fire lane" by giving the dog a command or signal. (Id., p.129-131). Mr. Longsine stopped his mini-van about 30 feet away from the man because he "didn't want to run the animal over" and intended to wait until the path was clear. (Id., p.131). Mr. Longsine testified that the man, whom he had "seen around the [apartment] complex," pulled out a gun, walked toward Mr. Longsine's mini-van and demanded that Mr. Longsine back up. (Id.). Mr. Longsine recalled that the man said he was with the Denver

Sheriff's Department,[1] and ordered Mr. Longsine to "back the fuck up." (Id., p.132). Mr. Longsine testified that man was pointing the gun "directly at [Longsine]," and described the gun as a black 9-millimeter. (Id.). Mr. Longsine estimated that the man was approximately 5 feet away from him. (Id.). Mr. Longsine testified that he was wondering whether the man was going to shoot him, and that he felt threatened and afraid for his family. (Id., p.132-133).

Mr. Longsine called out to the man that his wife and 2-year-old son were in the mini-van, and told the man that he "needed to lower his weapon." (Id., p.133). Mr. Longsine testified that the man continued to order him to "back the fuck up," and described the man's tone of voice as demanding and angry. (Id., p.133-134). Mr. Longsine demonstrated the man's "stance," explaining that he was standing with his legs apart, and had "one hand around the gun and the other one on the bottom." (Id., p.134). Mr. Longsine testified that the man was "kind of jabbing" the gun toward Mr. Longsine as he ordered him to back up, and surmised that the man was "trying to make his point known with the weapon." (Id., p.135).

Mr. Longsine noticed that the man was wearing what appeared to be a bulletproof vest. (Id.). Mr. Longsine testified that it looked like the man saw the

[1] Both Longsine and his wife testified that the defendant never displayed a badge. (v.8, p.133,156).

mini-van, and that he "knew [Longsine] was coming." (Id.). Mr. Longsine did not think that the man seemed surprised by him. (Id., p.135-136).

Mr. Longsine testified that he began backing his mini-van out of the fire lane/path, and that the man continuously "had his weapon drawn out on [Longsine] while [Longsine] was reversing." (Id., p.136). Mr. Longsine recalled that he went directly to the apartment complex office to tell the manager what happened. (Id.). At trial, Mr. Longsine identified Mr. Yusem as the man who pointed the gun at him that night. (Id., p.137).

During cross-examination, Mr. Longsine agreed that Mr. Yusem used a "stern voice" and sounded "panicked" and "scared" when he ordered Mr. Longsine to back up. (Id., p.145). Defense counsel also elicited testimony from Mr. Longsine confirming that Mr. Yusem had never before threatened Mr. Longsine or his family, and that Mr. Longsine had never had "any complaints or problems with Mr. Yusem." [2] (Id., p.147-148).

On re-direct, Mr. Longsine confirmed that he was at a complete stop after he saw the dog and did not move his mini-van again until he was ordered at gunpoint to back out of the fire lane/path. (Id., p.149-150).

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[2] The prosecutor objected on relevancy grounds and the trial court overruled the objection. (v.8, p.147-148).

Alicia Lonsine, Correy's wife, also testified about the events of April 6, 2005. (Id., p.151-152). Mrs. Longsine recalled that her husband stopped to talk to a friend for a few minutes and then was going "about five miles an hour" when they saw a man walking his dogs. (Id., p.153). Mrs. Longsine confirmed that the man "laid one of his dogs down" and that they "stopped so [they] wouldn't hit the dog." (Id., p.154).

Mrs. Longsine testified that the man approached their mini-van, pulled out a gun and pointed it at her husband, and told them to back up. (Id.). She estimated that the man was "maybe five feet" from the driver's side window while he was pointing the gun at her husband. (Id.). Mrs. Longsine testified that the man identified himself as a Denver Sheriff, and told them to "back the fuck up." (Id., p.155). She recalled that, as the man was giving the command to back up, he was "kind of jutting [the gun] towards [her] husband." (Id., p.156).

Mrs. Longsine described the man's tone of voice as "very harsh," and testified that she was "terrified." (Id.). She thought the man was going to shoot her husband, and testified that she started crying and asked her husband to "Please just leave." (Id.). Mrs. Longsine confirmed that they went straight to the apartment complex office to report the incident to the manager. (Id.). At trial,

Mrs. Longsine identified Mr. Yusem as the man who pointed the gun at her husband that night. (Id., p.157).

On cross-examination, defense counsel elicited Mrs. Longsine's confirmation that she had never had any personal contact, complaints, or problems with Mr. Yusem. (Id., p.160-161).

Police officer Jason Cirbo was dispatched to the Hyland Park Center apartments based on a "911 hang up" call. (Id., p.180). He testified that he was instructed to locate a man with three dogs, but after driving around the parking lot four or five times, he did not find anyone matching that description. (Id., p.181). Dispatch contacted Officer Cirbo again, telling him that the Hyland Park Center apartment manager needed police assistance. (Id.). Officer Cirbo responded to the manager's office and spoke with the Longsines. (Id.). He testified that Alicia Longsine had been crying and that Correy Longsine was "visibly shaking." (Id.).

Police officer Richard Lahr also responded to the Hyland Park Center apartments that evening. (Id., p.200). Officer Lahr and three other police officers went to Mr. Yusem's apartment to discuss the incident. (Id.). Officer Lahr testified that Mr. Yusem answered the door holding his gun – which was pointed towards the ground. (Id., p.201). After Mr. Yusem agreed to put down his weapon, Officer Lahr began to explain the reason for the visit. (Id.).

Mr. Yusem interrupted Officer Lahr and explained that he had observed a suspicious white SUV circling the parking lot and then he had taken his dogs for a walk. (Id.). Mr. Yusem stated that a car "almost ran him down" in the fire lane and that he had pulled out his off-duty weapon. (Id., p.202). Mr. Yusem confirmed that he ordered the vehicle to stop and back up, and that he identified himself as a Denver Sheriff's Deputy. (Id.). One of Officer Lahr's superiors then asked Mr. Yusem to continue the interview at the Federal Heights Police Department, and Mr. Yusem agreed. (Id.).

Officer Lahr conducted the initial stationhouse interview with Mr. Yusem. (Id., p.204). Mr. Yusem told Officer Lahr that, earlier in the evening, his neighbor approached him with concerns about her ex-brother-in-law's possible drug dealing with people in a black Cadillac Escalade.[3] (Id., p.205). Mr. Yusem recalled that, a short time later, while he was on his balcony smoking a cigarette, he saw a white SUV with tinted windows circling the parking lot and stopping at various times. (Id., p.206). Mr. Yusem explained that he felt like he was being stalked by the vehicle. (Id.).

[3] Officer Lahr testified that it was the neighbor's son, but the neighbor testified that it was her ex-brother-in-law. (v.9, p.23).

Mr. Yusem told Officer Lahr that, after the white SUV left the parking lot, he waited a few minutes and then took his dogs for a walk. (Id., p.207). Mr. Yusem recalled seeing the white SUV again while he was walking with the dogs, and explained that he walked away from the SUV and kept his hand on his gun. (Id., p.208). He reported that the SUV then left the area and he did not see it again. (Id.).

Mr. Yusem told Officer Lahr that he went to the fire lane/path to let his dogs run, and saw a mini-van stopped in the lane. (Id.). At first, he saw a person talking to someone inside the mini-van. (Id.). Then he said that the mini-van "started to come at him…at a fast rate [of speed.]" (Id., p.209). Mr. Yusem explained that, as the mini-van was coming at him, he pulled his gun from his holster and held it in the "low-ready position." (Id.). He reiterated that he ordered the mini-van to stop and to back up, and recalled that the driver of the van called out that he was from maintenance. (Id.). Mr. Yusem said that he repeated the command to back up, and that, as soon as the mini-van backed up, he no longer felt threatened and re-holstered his weapon. (Id.).

Mr. Yusem maintained that he never pointed his weapon at anyone in the mini-van, and that he kept his gun in the "gun-ready" position, which Officer Lahr explained was "a safe position…pointing towards the ground." (Id., p.210). Mr.

Yusem estimated that the mini-van was traveling toward him at 30 to 35 mph. (Id.).

After Officer Lahr concluded his interview with Mr. Yusem, Lieutenant Roger McLaughlin asked Mr. Yusem some follow-up questions. (Id., p.216-217). Lieutenant McLaughlin confirmed that the white SUV and the mini-van were two different vehicles, and that Mr. Yusem could not say whether the vehicles were associated with each other. (Id.).

Mr. Yusem indicated that he had a "heightened level of awareness" based on his earlier observation of the suspicious white SUV. (Id.). He told Lieutenant McLaughlin that he "generally" carries an off-duty weapon, but that he put on his bullet-proof vest because of the suspicious SUV. (Id., p.218).

Mr. Yusem told the Lieutenant that the mini-van was "barreling towards him" and was accelerating. (Id.). He indicated that he was afraid that the mini-van would run him over. (Id.). Mr. Yusem maintained that when he drew his gun, he held it in one hand, in the "gun-ready" position, while he held up his other hand "in a stop gesture." (Id., p.219). Mr. Yusem stated that he did not believe that the mini-van skidded when it stopped, and did not think that there were any tire marks left on the path. (Id.).

When Lieutenant McLaughlin asked why Mr. Yusem ordered the driver to back up, Mr. Yusem said that he "ha[d] experience working at the Denver County Jail and as [a matter] of training and habit he is used to not backing down." (Id., p.221).

The 404(b) Evidence

After the Longsines testified, the People called Karen Eckhardt, the office manager for the apartment complex, to testify about that evening and about an incident she had with Mr. Yusem in July of 2004. (v.8, p.167). Ms. Eckhardt testified that she received a call from Correy Longsine on her cell phone at about 9:30 p.m. on April 6, 2005. (Id., p.169). She said that Mr. Longsine, and his wife and child came to her office where Ms. Eckhardt called the police. (Id., p.170). Ms. Eckhardt testified that Mrs. Longsine was "very shaky, very scared," and that the Longsines stayed at the office for approximately two hours talking to police officers about the incident. (Id., p.173). Ms. Eckhardt did not speak with police that evening. (Id.).

Ms. Eckhardt then testified about an incident that she had with Mr. Yusem the summer before the charged offense, in July 2004.[4] (Id., p.174). According to Ms. Eckhardt, Mr. Yusem walked into the apartment complex office wearing plain clothes (not a police uniform) and a gun on his hip. (Id.). Ms. Eckhardt described Mr. Yusem as "very angry," "yelling," and "very agitated" and testified that she felt intimidated because of the presence of the gun. (Id., p.175-176). Ms. Eckhardt explained that Mr. Yusem was complaining that his apartment was "unfit to live in [because of water damage]." (Id., p.176,178).

Ms. Eckhardt confirmed that, during the incident, Mr. Yusem never mentioned his gun, grabbed for his gun, or unholstered his gun. (Id., p.176). Ms. Eckhardt testified that she did not call the police after the July 2004 incident. (Id., p.177).

During cross-examination, Ms. Eckhardt agreed that she had "no other problems with Mr. Yusem," and described Mr. Yusem's demeanor on other occasions as "very quiet." (Id., p.178).

Motion for Judgment of Acquittal

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[4] Prior to this testimony, the trial court read aloud a limiting instruction. At trial, defendant objected to the wording of the limiting instruction. That claim was abandoned on appeal. (v.8, p.9-11,174).

After the People rested, Mr. Yusem moved for a judgment of acquittal as to all charges. (v.9, p. 3-4). The trial court granted the motion with respect to counts 2 and 4 – the felony menacing of Alicia Longsine and the prohibited use of a weapon toward Mrs. Longsine, respectively, finding insufficient evidence that Mr. Yusem ever aimed the gun at Mrs. Longsine or that Mrs. Longsine feared for her own safety. (Id., p.7-8). The court denied the motion regarding the remaining counts (felony menacing and prohibited use of a weapon as to Mr. Longsine). (Id.).

The Defense Case

Wendy Kotzmoyer, Mr. Yusem's neighbor, and Vinchenza Burney, Mr. Yusem's ex-wife, confirmed Mr. Yusem's statement about his conversation with Mrs. Kotzmoyer about a suspected drug deal that would be happening that evening in the apartment complex. (v.9, p.19-35).

Ms. Burney also testified about a statement Mr. Yusem made to her when he returned from walking the dogs, that "a vehicle was, quote, about to run him down." (Id., p.36). On cross-examination, Ms. Burney confirmed that she had not disclosed Mr. Yusem's statement to police when she provided her written statement on the night of the incident. (Id., p.44-45).

Mr. Yusem testified in his own defense. (v.9, p.47). He described his conversation with Mrs. Kotzmoyer, indicating that he advised her to call 911, because both he and his wife worked in other jurisdictions. (Id., p.48). Mr. Yusem testified that the conversation about the possible drug deal made him "rather nervous," because he has children and worried about them being around drug dealers. (Id., p.49).

Mr. Yusem recalled that, while he was on his balcony smoking a cigarette, he saw a white SUV circling the parking lot and "stopp[ing] directly in front of [his] line of sight" in several different parts of the parking lot. (Id.). He explained that each time the white SUV stopped, it "appeared to be more or less addressing [him]" and did not seem to be looking for apartment numbers. (Id., p.50). He told the jury that he was "getting scared at that point" and that he assumed it was "the drug dealer." (Id., p.51).

Mr. Yusem testified that, after the white SUV left, he realized that he needed to take his dogs outside. (Id., p.53). He explained that he had been armed the entire evening, but that he was scared and did not want to take the dogs out, so he put on his bulletproof vest in case he encountered any armed drug dealers. (Id., p.54). He clarified that he was not planning on investigating any potential drug

deals, but indicated that if he saw the vehicle again, he would have written down the license plate number. (Id., p.55).

Mr. Yusem testified that he always wears his holster and carries his gun, even when off duty. (Id., p.54). He told the jury that his gun was issued to him by the Denver Sheriff's Department and that he had a concealed weapons permit that allowed him to carry the gun while off duty. (Id., p.56).

Mr. Yusem testified that, by the time he reached the ground floor with his dogs, he saw that the white SUV had returned to the parking lot. (Id., p.56-57). He described the SUV as "slowly creeping around" and "stalking [him]" as he walked his dogs. (Id., p.57). Mr. Yusem testified that he had "no cover," felt that he "needed to get out of there as quickly as possible," and took his dogs to the more secluded playground area. (Id., p.58).

Mr. Yusem recalled that he walked from the playground towards the fire lane/path so that he could access a wooded area where he could allow his dogs to run. (Id., p.60). He testified that, when he got to the fire lane, he saw a person talking into a parked mini-van and thought, "great, now here's a drug deal going down over here." (Id., p.61). He indicated that after he let his dogs off leash, he kept an eye on the mini-van, and kept checking for the white SUV. (Id., p.61).

Mr. Yusem testified that, while he was watching his dogs, he heard an engine whine "rather quickly" and looked up to see the mini-van "coming right at [him]." (Id., p.63). He said that he "jumped out of the way" and drew his weapon out, put up his hand, and started screaming, "Denver [S]heriff's [D]epartment, stop the vehicle; stop the vehicle, Denver [S]heriff's [D]epartment." (Id.). Mr. Yusem testified that the vehicle came to a stop. (Id.).

After the vehicle stopped, Mr. Yusem testified that he said, "Back your vehicle up, back the fuck up." (Id.). He recalled the driver of the mini-van calling out, "I'm with maintenance," and testified that he responded, "I don't care who you're with, just back your vehicle up now." (Id.). Mr. Yusem said that he heard a female voice say "just back your vehicle up" and that the driver then complied and began backing up. (Id.). Mr. Yusem testified that he then reholstered his weapon and called the Federal Heights police on the non-emergency line, to explain his encounters with the white SUV and the mini-van. (Id.).

When asked to explain to the jury why he drew his gun, Mr. Yusem said:

> A vehicle was traveling to me, what I assumed to be at a high, high rate of speed. Anything that covers a distance between the last time I looked at it and the moment I heard it, it had to be traveling pretty fast. I looked at it and the vehicle was still coming after me. The moment I heard it and looked, I jumped out of the way and I drew

> my weapon. I needed it because my life was in danger at that point, at least I felt.

(Id., p.64).

Mr. Yusem then explained the "ready position" in which he said he held his gun during the encounter:

> ...the ready position is not held down here, it's held up, so that once you can go on target, the muzzle can come right up on target.
>
> The muzzle is pressed toward the ground, right at the base, right at the ground where the vehicle and the ground are, but it certainly does appear that I am aiming it. However, the muzzle is depressed towards the ground and at no point did the muzzle ever point towards the occupants in the vehicle.

(Id., p.65). Mr. Yusem testified that the Denver Sheriff's Department's firearms training program taught him this technique, and agreed that his firearms training "came into play" during the incident. (Id., p.66).

During cross-examination, Mr. Yusem testified that the mini-van did not squeal its tires or leave any skid marks when it stopped in the fire lane. (Id., p.88). Mr. Yusem testified that he believed that he had reported to the non-emergency police dispatcher that he pulled his gun on a mini-van because he was afraid that the mini-van was going to run him down. (Id., p.95). After listening to a tape recording of that call, Mr. Yusem conceded that he never mentioned pulling his

gun on the mini-van or being afraid of being run down by the mini-van. (Id., p.97). He confirmed that he made that call immediately after the incident, while standing in the fire lane. (Id.).

Mr. Yusem testified that he did not wait for police in the fire lane, but instead returned to his apartment. (Id.). He admitted that he was "supposed to" contact "the authorities" to inform them that he had pulled his gun while off duty, and that he had not done that after this incident. (Id., p.98). On redirect, Mr. Yusem testified that, after he was questioned by the Federal Heights Police, he contacted the Denver Sheriff's Office and reported the incident. (Id., p.108).

The defense also presented testimony from William Beye, a Denver Sheriff's Deputy in charge of all recruit training in the use of firearms, legal aspects of deadly force, and concealed weapons. (v.9, p.115-116). Deputy Beye explained the nature of Denver Sheriffs' training in decision making with regard to the use of firearms. (Id., p.118). He explained, "we teach our officers that if it is a potential threat that the gun needs to come out so you're not behind in the fight." (Id.).

Deputy Beye testified that Denver Sheriff's Deputies are not required to carry concealed weapons off duty, that the decision to do so is "a personal choice."

(Id., p.119). Defense counsel asked Deputy Beye why the deputies are permitted to carry concealed weapons while off duty. (Id., p.120). Deputy Beye explained:

> In our line of work, we live with these inmates. We are not like a police officer who arrests them and only was with them maybe 15 or 20 minutes or even an hour. If they are at the county jail, they are there for maybe two years, depending on what happens. If we work a specific building, we are with that inmate every shift for ten hours or eight hours or whatever.
>
> They can get to know us. They know the spelling of our last name. They can look outside. They can see what kind of vehicles we drive. That's the reason we have concealed weapons, in order to protect ourselves.

(Id., p.120-121). Deputy Beye testified that he teaches Denver Sheriff Deputies to draw their weapons "if their life is in danger, [if they] fear for their life, [or fear] serious bodily injury." (Id., p.121).

Finally, Deputy Beye discussed the "ready position," explaining that it means that "the gun is at the ready just in case it needs to be utilized." (Id., p.123). He indicated that the muzzle should be pointed at the subject's feet to permit the officer to get a clear view of the subject's hands. (Id., p.124).

Jury Instructions

Just prior to closing arguments, the court read aloud several jury instructions. As pertinent here, the court instructed the jury regarding evidence of the July 2004 incident with Mr. Yusem and Ms. Eckhardt:

> The Court admitted certain evidence for a limited purpose. At that time, you were instructed not to consider it for any other purpose other than the limited purpose for which it was admitted. You are again instructed that you cannot consider evidence admitted for a limited purpose except for the limited purpose for which it was admitted. Certain evidence may be admitted for a particular purpose only and for no other.
>
> The testimony you heard from the witness Karen Eckhardt with regard to a prior encounter with the defendant is such evidence. It may be used as evidence for one or more of the following purposes: One, to establish the defendant's state of mind, motive, or knowledge on April 6th, 2005; two, to establish the defendant acted in the absence of mistake or accident on April 6th, 2005; and, three, to establish the defendant did not act in self-defense on April 6th, 2005. You should consider it as evidence and for no other purpose.

(v.9, p.151).

Closing Arguments

The prosecutor's initial closing argument focused on the elements of the charged crimes and the defendant's self-defense claim. The prosecutor told the jury, "you decide whether or not that self-defense claim is reasonable. You decide whether or not he had a reason to believe that he was … going to be run over by that van driven by Mr. Longsine." (Id., p.158). The prosecutor did not refer to Ms. Eckhardt's testimony. (Id., p.155-160).

Toward the end of a lengthy summation, defense counsel discussed the other act evidence:

> What did Ms. Eckhardt show you? She wasn't there. She had no idea. She didn't witness the event. She can't testify to what Mr. Yusem did. She can't testify to the speed of the vehicle. She can't testify as to why my client unholstered that weapon. She can only testify about some isolated event that took place back in July of 2004 where she said she felt threatened because he happened to have his weapon in his holster, and that he was agitated about the water damage to his home. Does that disprove my client's actions? It does not.

(Id., p.171).

In his rebuttal closing argument, the prosecutor discussed the witness credibility instruction, urging the jurors to consider what each witness had to gain or lose based on their testimony. (Id., p.173). He argued that Mr. Yusem's belief that he had to defend himself from imminent harm was not reasonable based on the Longsines' testimony about their speed, their ability to observe Mr. Yusem's dog lying in the path, and the lack of skid marks found on the path. (Id., p.174). The prosecutor pointed to the Denver Sheriff Personnel Rules and argued that Mr. Yusem was off-duty patrolling that night, rather than acting in self-defense. (Id., p.175-176).

Toward the end of his rebuttal closing argument, the prosecutor responded to defense counsel's "minimiz[ation]" of Ms. Eckhardt's testimony. (Id., p.177). The prosecutor first argued that Mr. Yusem violated the Denver Sheriff's Department's policies by displaying his gun while not in uniform. (Id.). Defense counsel objected and the trial court sustained the objection and gave a brief curative instruction reminding the jury to direct its attention to only the charged offenses. (Id., p.177-178). The prosecutor then directed the jurors to Instruction No. 17, the written limiting instruction for the other act evidence. He argued that Mr. Yusem used his weapon to "intimidate" and "control" both during the incident with Ms. Eckhardt and during the charged offenses. (Id., p.178). The prosecutor completed his rebuttal argument without further mention of the other act evidence. (Id., p.178-180).

The Court of Appeals' Opinion

The court of appeals upheld the conviction, with one judge dissenting. People v. Yusem, *supra*. The panel concluded, as pertinent to the question on certiorari, that that the other act evidence: (1) related to a material fact – whether Mr. Yusem acted in self-defense; (2) was logically relevant to Mr. Yusem's intent in pulling his weapon out of its holster; (3) the logical relevance was independent of the intermediate inference that Mr. Yusem acted in conformity with a bad

character; and (4) any potential unfair prejudice was "plainly outweighed by the probative worth of the evidence." Slip op. 7-8.

Judge Dailey, the dissenting judge, disagreed with the panel's conclusion, opining that the evidence did not show a pattern, in part because during the previous incident Mr. Yusem never touched or threatened to use his firearm and never claimed that he was defending himself. Id. at 13. Judge Dailey did not believe that the other act evidence was probative of a plan, scheme, modus operandi, or motive for the charged offense. Id. Further, Judge Dailey concluded that the prior incident was relevant only to show that Mr. Yusem was capable of bullying others with his firearm and to suggest that, on this occasion, Mr. Yusem "most likely" used his firearm to bully the victim. Id. Judge Dailey also concluded that the "incremental" probative value of the other act evidence was outweighed by the danger of unfair prejudice – namely that the jury would convict defendant solely because they believed that he was a bully, and not based on the merits of the charged offense. Id. at 14-15.

SUMMARY OF ARGUMENT

The other act evidence was properly admitted as evidence of Mr. Yusem's intent because the evidence: (1) related to the material fact of Mr. Yusem's intent

and whether he acted in self-defense; (2) was logically relevant to Mr. Yusem's intent; (3) did not depend upon an intermediate inference that Mr. Yusem has a bad character and acted in conformity with that character; and (4) the danger of unfair prejudice did not outweigh the probative value of the evidence where details of the other act were not likely to anger or shock the jury and where the jury received adequate limiting instructions.

In the alternative, admission of the other act evidence was proper because Mr. Yusem "opened the door" by questioning witnesses about his character, demeanor, and behavioral history.

ARGUMENT

I. The Court of Appeals correctly concluded that the trial court did not abuse its discretion by admitting evidence of a prior incident in which Mr. Yusem displayed his gun during a confrontation with his apartment manager.

A. Standard of review

The People agree with Mr. Yusem that the trial court has substantial discretion in determining the admissibility of evidence, and absent an abuse of discretion, the trial court's evidentiary rulings will be affirmed. Kaufman v. People, --- P.3d ----, 2009 WL 368603, *8 (Colo. 2009); People v. Eppens, 979 P.2d 14, 22 (Colo. 1999). To constitute an abuse of discretion, the trial court's

evidentiary ruling must be manifestly arbitrary, unreasonable, or unfair. People v. Rath, 44 P.3d 1033, 1043 (Colo. 2002). Appellate courts "must assume the maximum probative value a reasonable fact finder might give the evidence and the minimum unfair prejudice to be reasonably expected from its introduction." Id.

In assessing whether the other act evidence was properly admitted, this Court is not bound by the reasoning employed by either the trial court or the Court of Appeals. *See* People v. Quintana, 882 P.2d 1366 (Colo. 1994) (on appeal a party may defend trial court's judgment on any ground, regardless of whether contemplated by trial court); People v. Cousins, 181 P.3d 365, 370 (Colo. App. 2007) (conviction will not be overturned based upon erroneous admission under CRE 404(b) if the evidence is admissible and has a proper foundation).

If the trial court is determined to have abused its discretion, this non-constitutional, evidentiary error is deemed harmless if it did not substantially influence the verdict or impair the fairness of the trial. People v. Stewart, 55 P.3d 107, 124 (Colo. 2002).

B. Procedural history

1. Applicable law

CRE 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

conformity therewith." But such evidence may be admissible for purposes other than showing criminal propensity, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. CRE 404(b).

In all cases, before admitting evidence of other crimes or bad acts, the trial court should determine that: (1) the proffered evidence relates to a material fact; (2) the evidence is logically relevant to the material fact; (3) the logical relevance is independent of the intermediate inference that the defendant has a bad character; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. People v. Spoto, 795 P.2d 1314 (Colo. 1990).

The trial court must also determine by a preponderance of the evidence that the other act did, in fact, occur. People v. Garner, 806 P.2d 366 (Colo. 1991). However, this preliminary determination is implicit in the decision to admit the evidence and need not be placed explicitly on the record. People v. McGraw, 30 P.3d 835 (Colo. App. 2001).

2. The first 404(b) hearing

Prior to trial, the court held a hearing on the admissibility of Ms. Eckhardt's testimony.[5] (v.6). The prosecutor argued that the evidence "counter[ed] defendant's own statement that [he] was simply following training," and "counter[ed] the asserted defense of self-defense," and was probative of the material fact of whether Mr. Yusem knowingly placed Mr. Longsine in fear of serious bodily injury. (Id., p.6-7). Defense counsel countered that, while Mr. Yusem's intent was "undeniably a material fact," the evidence was not probative of Mr. Yusem's intent. (Id., p.18). Defense counsel asserted that the evidence was therefore not logically relevant. (Id., p.19).

Applying the 4-part test from Spoto, *supra*, the trial court held that the prosecution's offer of proof "that there is an ongoing plan or scheme or modus operandi or motive to place people…in fear of imminent bodily injury in connection with the side arm," satisfied the requirement that the evidence must relate to a material fact. (Id., p.39-40). Regarding the second prong of the test, the trial court held that the other act evidence was relevant "under the prosecution's

[5] At the same hearing, the parties litigated whether Mr. Yusem's personnel records should be disclosed, and the prosecutor informed the court of the possibility that some of the material from those files "could be the basis of another 404-type motion." (v.6, p.5).

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." (Id., p.41). Third, the court held that this inference did not rely on the criminal character of the accused, but arose independently from the demonstration of Mr. Yusem's "pattern of using a particular technique to accomplish a particular manner" – which is a permissible purpose under 404(b). (Id.). Fourth, the court held that admission of the evidence was "not outweighed by any danger of unfair prejudice, confusion of the issues, or misleading of the jury." (Id., p.43).

3. The second 404(b) hearing

After the first 404(b) hearing, the trial court disclosed Mr. Yusem's personnel files to the attorneys, and set the matter for another pretrial hearing. At the second hearing, the prosecution described an incident that occurred while Mr. Yusem was working at the Denver County Jail. (v.7, p.3-4). In that incident, Mr. Yusem, as a deputy sheriff, responded to a "scuffle" outside the jail in which Mr. Yusem allegedly used excessive force to subdue a woman involved in the scuffle. (Id., p.3-4). The prosecutor moved to admit evidence of the incident under CRE 404(b), arguing that it was relevant to the issue of whether Mr. Yusem reasonably believed that his response (in the instant case) was appropriate. (Id.). Specifically,

the prosecutor argued that the evidence was probative of Mr. Yusem's state of mind and his ability to assess a situation and determine the appropriate level of force that was necessary. (Id., p.5).

Again, applying the 4-part analysis from Spoto, *supra*, the trial court first found that the proffered evidence related to the material fact of whether Mr. Yusem "reasonably respond[s] to threats and reasonably perceives threats, whether his conduct is reasonable." (Id., p.22-23). Apparently skipping the second step (the logical relevance of the evidence), the trial court next held that the "only logical inference from [evidence of the jail incident] can be that the defendant['s] act…reflects bad character and a propensity to commit crimes because of it." (Id., p.23). The court further noted that no weapon was involved in the jail incident, and that there was no evidence that Mr. Yusem used an "inappropriate" level of force. (Id., p.24). Finally, the court concluded that, even if logical relevance independent of the prohibited inference had been shown, the probative value of the evidence was substantially outweighed by unfair prejudice, confusion, or undue delay – and denied the prosecutor's request to admit evidence of the jail scuffle. (Id.).

4. Contemporaneous ruling at trial

At trial, before the prosecution called Ms. Eckhardt to the stand, the parties discussed the proposed limiting instruction which would precede the introduction of the other act evidence. (v.8, p.164). Defense counsel reiterated his objection to the admission of the evidence on the grounds specified in the limiting instruction, and argued that the evidence and the instruction were "highly prejudicial," "overly broad," and would not be helpful to the jury. (Id., p.165). The prosecutor recalled that Judge Moss, who was not presiding over the trial, had not placed any limitations on the admission of the evidence. (Id.). Judge Bockman, the trial judge, edited the limiting instruction to exclude the evidentiary hypotheses of identity and opportunity – finding that they were not applicable. (Id., p.165-166).

Judge Bockman went on to discuss Colorado cases addressing the use of 404(b) evidence to rebut self-defense claims, citing Douglas v. People, 969 P.2d 1201 (Colo. 1998) and Spoto, *supra*. (Id., p.166). The court noted that defense counsel raised the issue of self-defense in his opening statement, and ruled that the 404(b) evidence would be admissible to rebut the existence of self-defense. (Id.).

C. Legal Analysis

As a threshold issue, "[i]t is well settled that [Rule 404(b)] is one of inclusion which admits evidence of other crimes relevant to an issue in a trial,

unless the evidence is introduced for an impermissible purpose or undue prejudice is shown." U.S. v. Cuch, 842 F.2d 1173, 1176 (10th Cir. 1988); *see also* Cousins, 181 P.3d at 369. Thus, while Rule 404(b) is designed to protect criminal defendants from "the human tendency to permit notions of bad character to carry the day," it also "recognizes that the difficult task of fact-finding is better facilitated when, if not unduly prejudicial, relevant evidence is admitted," especially "where sufficient protections exist, such as jury instructions to limit the use of the evidence." Douglas, *supra* at 1208.

1. The evidence relates to a material fact

The statutes defining menacing and self-defense delineate the material issues of fact in this prosecution. Section 18-3-206, C.R.S. (2008), provides:

> (1) A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 3 misdemeanor, but, it is a class 5 felony if committed:
>
> (a) By the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon[.]

Section 18-1-704, C.R.S. (2008), provides:

> (1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or

> imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

Thus, the material issues of fact were the dueling theories of intent: (1) whether Mr. Yusem knowingly placed or attempted to place Mr. Longsine in fear of imminent serious bodily injury; or (2) whether Mr. Yusem reasonably believed that he was defending himself from the use or imminent use of unlawful physical force by Mr. Longsine.

At the pretrial hearing, the presiding judge characterized the relationship between the other act evidence and the issues of material fact as an "ongoing plan or scheme or modus operandi or motive to place people...in fear of imminent bodily injury in connection with the side arm." (v.6, p.39-40). However, at trial, the presiding judge also found that the evidence was relevant to rebut self-defense. (v.8, p.166).

On appeal, the majority correctly determined that the other act evidence related to the material fact of Mr. Yusem's intent – "whether he acted in self-defense when he used his weapon to knowingly place the victim in fear of serious bodily injury." Slip op. at 6. Additionally, the record supports the conclusion that

the other act evidence related to the material fact of whether Mr. Yusem knowingly placed the victim in fear.

The dissenting judge countered this argument by asserting that the issue of Mr. Yusem's intent to place the victim in fear was undisputed, a claim Mr. Yusem reiterates in his Opening Brief. Slip op. at 14-15; (Opening Brief, p.17). However, assertion of the affirmative defense of self-defense does not, in fact, relieve the prosecution of its burden of proving all elements of the offense beyond a reasonable doubt. *See* §18-1-407(2), C.R.S. (2008) ("the guilt of the defendant must be established beyond a reasonable doubt as to [the affirmative defense] as well as all other elements of the offense.").

While an assertion of self-defense appears to presuppose that the actor committed the elements of the offense, there was no stipulation to that effect, and thus the issue of whether Mr. Yusem knowingly placed Mr. Longsine in fear remained a material fact essential to the prosecution's case for the purposes of a 404(b) relevancy analysis. *See* People v. Snyder, 874 P.2d 1076, 1080 (Colo. 1994). The degree to which a fact is contested is an issue of the weight to be given to the evidence, and does not govern its admissibility. *See* Rath, 44 P.3d at 1033 n.4 ("Whether a material fact is contested clearly affects…the incremental

probative value of the evidence offered to prove it, but it does not make the fact itself any less material…").

Accordingly, the record supports the conclusion that the other act evidence related to the material facts probative of Mr. Yusem's intent.

2. The other act evidence was logically relevant.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. The test of relevancy is whether it renders the claimed inference more probable than it would be without the evidence. It does not matter that other inferences may be equally probable; it is for the jury to determine what motivated the behavior. People v. Summitt, 132 P.3d 320, 324 (Colo. 2006).

Relevance "is more a concept than a definition." 2 Fed. R. Evid § 401.02[1]. According to the Advisory Committee for Fed. R. Evid. 401, "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Fed R. Evid § 401.01[2].

"Evidence need not prove conclusively the proposition for which it is offered, nor make that proposition appear more probable than not, but it must in some degree advance the inquiry. Weinstein, § 401.04[2][b] (emphasis added). "Rule 401 uses a lenient standard for relevance." Id. at § 401.04[2][c][i]. So long as the evidence "appear[s] to alter the probabilities of a consequential fact," it is relevant. Id.

Here, the other act evidence was logically relevant to the issue of Mr. Yusem's intent – either to commit the offense or to act in self-defense. "[The *mens rea*] is often the most difficult element of the crime to prove; a third person can observe the actor and the act, but the third person can only surmise as to the actor's state of mind. The courts realize the prosecutor's difficulty in proving *mens rea*. For that reason, the courts are most liberal in admitting evidence to prove *mens rea*." Edward J. Imwinkelreid, *Uncharged Misconduct Evidence*, §5:01, at 2-3 (2006). A trial court is vested with considerable discretion in determining whether evidence of other misconduct is relevant. People v. Willner, 879 P.2d 19 (Colo. 1994); People v. Williams, 899 P.2d 306 (Colo. App. 1995).

In the instant case, the dissenting judge and Mr. Yusem urge that the evidence was not logically relevant because it did not show "a plan, scheme, modus operandi, or motive for the charged offense," noting that Mr. Yusem "did

not on that occasion touch or overtly threaten to use his firearm or claim that he was defending himself." Slip op. at 13; (Opening Brief, p.18-19). **If** the logical relevance of the evidence had been premised on the existence of a plan, scheme, or modus operandi, the dissimilarity between the charged offense and the other act would have been significant. *See* Edward J. Imwinkelreid, *Uncharged Misconduct Evidence*, §5:06, at 16 (2006) ("The importance of the act's similarity depends upon the proponent's theory of logical relevance.").

However, the logical relevance of the other act evidence was to negate Mr. Yusem's claim of self-defense and to shed light on whether Mr. Yusem knowingly placed Mr. Longsine in fear of serious bodily injury. As the majority held, in light of Mr. Yusem's self-defense claim, the other act evidence was logically relevant to "defendant's intent in pulling his weapon out of its holster." Slip op. at 6.

The legal issues in this case are almost mirrored by Douglas v. People, *supra*, a menacing with a deadly weapon case in which Douglas asserted self-defense. The Supreme Court ruled that evidence of two prior incidents was admissible under CRE 404(b) to rebut Douglas' claims of self-defense and defense of premises. The two prior incidents were: (1) Douglas became enraged and threatened a former girlfriend with a gun while on a camping trip, and (2) Douglas

was angry and went into a neighbor's yard and home, pointing a gun at the neighbor and threatening to kill her. Douglas, 969 P.2d at 1203.

The Supreme Court ruled that the prior incidents were relevant to rebut Douglas' claim of self-defense by showing that he had previously threatened others with a gun without provocation and in the absence of any danger to himself. Id. at 1206. A reasonable belief that one is defending against the use of unlawful force is the touchstone of self-defense. People v. Hayward, 55 P.3d 803, 805 (Colo. App. 2002).

Here, as in Douglas, the question before the jury was whether Mr. Yusem used his gun in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by Mr. Longsine, or whether he acted only to menace Mr. Longsine. The Court in Douglas noted that "[i]t is this state of mind, sufficient to avoid criminal responsibility unless the prosecution disproves its existence beyond a reasonable doubt, that was before the jury and to which the prior acts provided relevant evidence independent of the prohibited inference of bad character." Douglas, 969 P.2d at 1207.

Here, the jury could infer from Mr. Yusem's conduct in the prior incident that he intentionally displayed his weapon to scare and intimidate Ms. Eckhardt. This inference increases the likelihood that Mr. Yusem knowingly used his weapon

to place Mr. Longsine in fear, and decreases the likelihood that Mr. Yusem acted in self-defense. Accordingly, the majority correctly upheld the trial court's determination that the other act evidence was logically relevant to these material facts.

3. The logical relevance of the evidence was independent of the inference that Yusem acted in conformity with his bad character.

The chain of logical inferences from the incident with Ms. Eckhardt does not rely upon an intermediate inference that Mr. Yusem must have committed felony menacing against Mr. Longsine **because** he is a person of criminal character. The focus of this prong of the Spoto analysis is the **purpose** for which the evidence is admitted and **how the evidence is used**.

All evidence of other crimes, wrongs, or acts demonstrates that the actor is the kind of person who would commit such an act. This inference is unavoidable. Accordingly, the absence of such an inference is not required, only relevance apart from that inference. Snyder, *supra*, at 1080. As discussed in the preceding section, the other act evidence admitted here was logically relevant to the issue of Mr. Yusem's intent – whether, as the prosecution argued, he intended to commit menacing, or as the defense argued, he acted in self-defense. This purpose is

independent of any inference that Mr. Yusem has a bad character or, as the dissent phrased it, "to portray [Mr. Yusem] as a bully" and suggest that he acted in conformity with that character when he committed the charged offense. Slip op. at 13, 15.

Because both inferences flow from the same evidence, "the prosecution may not exploit [the impermissible character/propensity] inference but must restrict its use of the evidence to the purposes for which it was admitted." People v. Willner, *supra*, at 27, n. 22. Here, the prosecutor did not even refer to the other act evidence during initial closing argument. (v.9, p.155-160). When the prosecutor did discuss the evidence, he first directed the jury's attention to the written limiting instruction regarding the evidence, and then argued that Mr. Yusem used his weapon to "intimidate" and "control" both with Ms. Eckhardt and the Longsines. (Id., p.178). Thus, the prosecutor's argument was limited to a single inference – that the other act evidence was probative of Mr. Yusem's intent, either because it suggested that he was menacing Mr. Longsine, or decreased the likelihood that Mr. Yusem was acting in self-defense.

Additionally, the limiting instructions – read to the jury prior to the admission of the other act evidence and provided in written form at the close of evidence – mitigated the possibility that jurors would use the evidence for an

improper purpose. *Cf.* People v. Nuanez, 973 P.2d 1260, 1263-264 (Colo. 1999) (admission of 404(b) evidence proper where the evidence "played a minor role in the prosecution's case-in-chief," was only briefly mentioned in opening and closing arguments, proper limiting instructions were given, and the prosecutor reiterated the limiting instruction in closing argument).

The existence of logical relevance, coupled with adequate limiting instructions and appropriate argument by counsel, supports the majority's conclusion that the logical relevance of the other act evidence was independent of the intermediate inference that Mr. Yusem acted in conformity with his bad character.

4. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Because the Colorado Rules of Evidence favor admission, "a reviewing court must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." Rath, 44 P.3d at 1043. As noted in Rath, "unfair prejudice within the meaning of the rule still refers only to 'an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis' and does not mean prejudice that results from the legitimate probative force of the evidence." Id. The

inquiry is whether admission of the evidence "adversely affected the defendant's position by injecting considerations which were extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger, or shock." People v. District Court, 869 P.2d 1281, 1286 (Colo. 1994).

Mr. Yusem argues that the evidence was unfairly prejudicial because it impacted his credibility as a witness and "unfairly undermined" his self-defense claim. (Opening Brief, p.23). The fact that the other act evidence may have successfully rebutted Mr. Yusem's self-defense claim – the precise purpose for which it was admitted – does not establish unfair prejudice. Regarding credibility, the jury instructions expressly limited the purpose for which the jurors could consider the evidence. It is presumed that the jury followed the instructions of the trial court. People v. Trujillo, 83 P.3d 642 (Colo. 2004). Moreover, the other act evidence did not tend to show that Mr. Yusem was dishonest or otherwise not credible as a witness. Defendant has not shown unfair prejudice.

The dissenting judge found the potential for unfair prejudice "significant" because, in his view, "the effect of the prior incident was to portray [Mr. Yusem] 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.

This reasoning is unpersuasive. The other act described here did not involve a heinous crime or a tremendous moral wrong. There is nothing in the record to support the supposition that the jury disregarded the limiting instructions and based its verdict **solely** on Mr. Yusem's character trait of intimidation. The fact that Mr. Yusem was acquitted of prohibited use of a weapon strongly suggests that Mr. Yusem's position was not adversely affected by considerations extraneous to the merits of the lawsuit.

II. In the alternative, Mr. Yusem opened the door to admission of the 404(b) evidence by eliciting evidence of his positive character traits.

A. Standard of review

Trial courts have broad discretion to make evidentiary determinations. People v. Melillo, 25 P.3d 769, 773 (Colo. 2001).

B. Legal analysis

The concept of "opening the door," is not codified in the rules of evidence. The Colorado Supreme court has held that the concept represents an effort by courts to prevent one party from gaining an unfair advantage by presenting evidence that, without being placed in context, creates an incorrect or misleading impression. Melillo, 25 P.3d at 775.

In People v. Pennese, 830 P.2d 1085, 1088-1089 (Colo. App. 1991), the court of appeals held that the defendant opened the door for the prosecution to pursue questions about the defendant's character. During cross-examination of Pennese's girlfriend, defense counsel attempted to elicit testimony that the aggressive behavior during the charged offense was unusual, and that Pennese's girlfriend had never witnessed this type of aggression before. Defense counsel also elicited testimony that the defendant was an "easy-going person" and had never harmed the witness.

Similarly, Mr. Yusem's attorney elicited testimony about Mr. Yusem's character and capacity for threatening behavior. Over the prosecutor's objection, defense counsel asked Mr. Longsine whether Mr. Yusem had ever "threatened [Mr. Longsine's] family," and whether Mr. Longsine "personally [ever] had any complaints or problems with Mr. Yusem." (v.8, p.147-148). Defense counsel asked Mrs. Longsine whether she ever had "any complaints, or problems with Mr. Yusem." (Id., p.160-161). During her cross-examination, defense counsel asked Ms. Eckhardt whether she "ever had any other problems with Mr. Yusem." (Id., p.178). He asked Ms. Eckhardt to "classify [Mr. Yusem's] demeanor toward [her] on [the] other occasions." (Id.). Ms. Eckhardt stated Mr. Yusem was "very quiet." (Id.).

Thus, admission of the prior act evidence was proper because Mr. Yusem "opened the door" by placing his character at issue.

CONCLUSION

For the reasons set forth above, this court should affirm the judgment of the court of appeals that Mr. Yusem failed to demonstrate that the trial court's evidentiary ruling was manifestly arbitrary, unreasonable, or unfair.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon PAMELA A. DAYTON, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 9th day of March 2009.