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Denver District Court Honorable Shelley I. Gilman Case Number 05CR674	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. JONATHAN ESTES Defendant-Appellant	▲ COURT USE ONLY ▲
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OPENING BRIEF OF JONATHAN ESTES

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INTRODUCTION

Defendant-Appellant was the defendant in the trial court and will be referred to by name (Mr. Estes). Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the date and page number of the record on appeal.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court denied Mr. Estes his right to confront the witnesses against him and reversibly erred by admitting hearsay statements the shooting victim, who did not appear at trial, purportedly made to police after the shooting.

II. Whether the trial court reversibly erred by admitting into evidence and playing to the jury a videotaped interview of the critical trial witness that was inadmissible hearsay under the rules of evidence.

III. Whether the trial court erred and denied Mr. Estes due process of law by denying Mr. Estes' motion for a new trial based on newly discovered evidence.

STATEMENT OF THE CASE

On January 5, 2005, the prosecution charged Mr. Estes with criminal attempt to commit murder in the first degree, a class-two felony in violation of CRS §§ 18-3-102(1)(a), 18-2-101; criminal attempt to commit aggravated robbery, a class-four

felony in violation of CRS § 18-4-302(1)(b); and a violent crime sentence enhancing charge pursuant to CRS § 18-1.3-406(2)(a)(I)(A). (v1, p1). A jury trial was held February 6, 2006 to February 10, 2006. The jury convicted Mr. Estes of the charged offenses and found that Mr. Estes used or possessed and threatened the use of a deadly weapon during the commission of the attempted murder. (v1, p31-33). The district court sentenced Mr. Estes to forty years in the Department of Corrections on the attempted murder count and a consecutive term of five years in the Department of Corrections on the attempted aggravated robbery count. (v1, p73). Mr. Estes filed a notice of appeal and this appeal followed.

STATEMENT OF THE FACTS

On the afternoon of November 5, 2004, Rodney Jones was shot at the Montbello park-and-ride in Denver. Chantelle Humphrey, an RTD employee present at the park-and-ride during the shooting, testified that, at approximately 4:00 p.m., she saw a red SUV with "spinner" rims drive into the parking lot and park near the bus-stop shelter. (v2/6/06, p52, 57). Three men then approached the SUV, spoke briefly to the driver, and walked away. (v2/6/06, p58). As they walked away, Ms. Humphrey, who was standing approximately fifteen feet from the SUV, saw the driver get out of the SUV and begin yelling and cursing at the three men and making obscene gestures. (v2/6/06, p62-65). One of the three men then shot a handgun at

the driver several times as the driver got back in the SUV and drove away. (v2/6/06, p67-69).

According to Ms. Humphrey, the three men in the parking lot, including the shooter, were black, young and small. (v2/6/06, p60). The shooter was approximately five feet, eight inches tall and wearing a red shirt. (v2/6/06, p71, 80). Ms. Humphrey was shown various lineups by the police, including photos of Mr. Estes, but was unable to identify anyone, and at trial Ms. Humphrey did not testify that Mr. Estes was the shooter. (v2/6/06, p81; v2/7/06, p206-07).

DeRoyce Davis, another RTD employee present at the shooting, similarly testified that he saw a large, red SUV pull into the parking lot, saw the driver get out of the SUV and argue with three young men, and then heard shots ring out as the SUV drove away. (v2/6/06, p112-16). Like Ms. Humphrey, Mr. Davis described the three men as small, telling police that the shooter was five feet, five or six inches tall and approximately 120 pounds. (v2/6/06, p119-20, 124-25). Mr. Davis, similarly could not identify any of the three men when shown photo lineups by police. (v2/6/06, p119; v2/7/06, p206-07). Asked to comment on Mr. Estes at trial, Mr. Davis stated that the shooter was shorter and lighter than Mr. Estes, who was approximately six feet tall and heavy-set. (v2/6/06, p125).

Shortly after the shooting, police found Mr. Jones on the ground in his front yard, approximately a half-mile from the park-and-ride, bleeding from the neck. (v2/6/06, p87-88). Police then followed a fresh trail of blood into some bushes in Mr. Jones' yard and found a bag of crack cocaine. (v2/6/06, p101-02). After being placed in an ambulance, Mr. Jones told police he was approached in his SUV by two black males, approximately five-feet, seven inches tall with thin builds. (v2/7/06, p25, 31). Mr. Jones did not mention the cocaine found in his bushes, but instead purportedly claimed that one of the men, wearing a red shirt, black pants and a black bandana, pointed a gun at him, said "give me your ride," then shot Mr. Jones. (v2/7/06, p25).

The police had no suspects in the shooting until December 29, 2004, when Nanette Calhoun called police and complained that Mr. Estes was at her house and threatening her. (v2/7/06, p163). Ms. Calhoun was the mother of Jaqueela Young, who was Mr. Estes' girlfriend and the mother of his child. (v2/6/06, p47; v2/7/06, p6). Ms. Calhoun was also the aunt of Derrick Moore and Arthur "Ray" House, both of who were younger and smaller than Mr. Estes and who had told Ms. Young information about the shooting at the park-and-ride, which Ms. Young testified she then told her mother Ms. Calhoun. (v2/7/06, p131-34; v2/8/06, p6). Ms. Calhoun

testified she disliked Mr. Estes and did not want him seeing her daughter Ms. Young. (v2/8/06, p6).

After police responded to Ms. Calhoun's call regarding Mr. Estes, Ms. Calhoun told them Mr. Estes had shot someone at the park-and-ride. (v2/8/06, p18). After the police arrested Mr. Estes, Ms. Calhoun met with a detective, told him that Ms. Young had information regarding the shooting, and took the detective back to her house to speak with Ms. Young. (v2/8/06, p19).

Ms. Young met with detectives on the evening of December 29 and signed a brief statement prepared by police in which she stated that, based on statements Mr. Estes made on November 5, she believed Mr. Estes and Mr. Moore were involved in the shooting at the park-and-ride. (v2/7/06, p57-58; Ex. 52). The next day, Ms. Young accompanied Ms. Calhoun to the police station and, in what the investigating detective acknowledged was a departure from interview protocol, was interviewed by the detective while her mother observed and occasionally interjected and reminded Ms. Young of certain points. (v2/7/06, p216). In the interview, Ms. Young claimed that Mr. Estes had called her on the afternoon of November 5 and told her he could not pick her up from work because he was "hot" because he "shot some fool . . . in the parking lot." Ms. Young claimed that Mr. Estes told her he shot the man "for his rims." During the interview, Ms. Young on several occasions minimized any

information she had about Mr. Moore, stating that she had only "assumed" Mr. Moore was with Mr. Estes and that Mr. Estes never said he was with Mr. Moore. (Ex. 44).

Several months later, Ms. Young wrote a letter to the court and attempted to speak to the prosecution to retract her allegations regarding Mr. Estes. (v2/7/06, p136; Ex. 54). Mr. Estes had never told Ms. Young anything implicating him in the shooting at the park-and ride; the information she had about the shooting came from her cousins, Mr. Moore and Mr. House. (v2/7/06, p133, 138). Ms. Young had lied in her interviews with police because she was angry with Mr. Estes for hitting her on Christmas day, and Ms. Young's mother had pressured Ms. Young to help her "put that bastard away" because Ms. Calhoun hated Mr. Estes and wished to protect Mr. Moore and Mr. House. (v2/7/06, p77-78, 124-28, 133). Ms. Calhoun had told Ms. Young that if Ms. Young did not cooperate in her scheme to blame Mr. Estes for the shooting, Ms. Calhoun would have Ms. Young's children removed from her home, a threat Ms. Young believed because she had previously been told by police that social service could take her children based on the condition of her home. (v2/7/06, p62, 125-26, 134-35). Ms. Calhoun told Ms. Young what to tell police and sat in on her interviews to make sure she did so. (v2/7/06, p68, 125). Indeed, while Ms. Young told police on December 29 that she thought Mr. Estes might be "involved" in the

shooting, by the interview the next day she changed her story at her mother's behest and stated that Mr. Estes had told her he was the shooter. (v2/7/06, p141). Ms. Young told the lies because she did not believe they would ultimately result in Mr. Estes being charged with the shooting, and after court proceedings commenced she admitted her lies because, in fact, Mr. Estes had not told her anything about the shooting. (v2/7/06, p136-38).

In response to questioning after his December 29 arrest, Mr. Estes mistakenly told police he was in Arapahoe County jail on November 5. (v2/7/06, p185). Mr. Estes consistently maintained that he had nothing to do with the shooting. (v2/7/06, p186-87). Police subsequently recorded several telephone conversations between Mr. Estes in jail and Ms. Young. Mr. Estes and Ms. Young argued and insulted one another at various times in the telephone conversations, but Mr. Estes consistently maintained that he did not do the shooting and implored Ms. Young to tell the truth, and Ms. Young admitted that she did not hear about the shooting from Mr. Estes. (v2/7/06, p196-203).

On December 29, after Ms. Young's initial talk with police, the police obtained her permission to search the home she shared with Mr. Estes. (v2/7/06, p165). Police found nine bullets in the home, none of which matched the caliber of the

bullets used in the shooting of Mr. Jones. (v2/7/06, p166, 210). Indeed, the prosecution presented no physical evidence linking Mr. Estes to the shooting.

In a post-trial hearing, Ms. Young testified that she spoke to Mr. Moore and Mr. House after the trial, and both men admitted that Mr. Moore shot Mr. Jones. (v6/23/06, p6-12). Ms. Young surreptitiously recorded one of her conversations with Mr. Moore and, while the recording quality is poor and most of the conversation is unintelligible, Mr. Moore can be heard on the tape discussing the shooting, stating he "cocked my shit again" as Mr. Jones drove off, and what had become of his gun. (6/23/06 ex. C).

SUMMARY OF THE ARGUMENT

The trial court overruled a defense objection on confrontation grounds and allowed the prosecution to introduce hearsay statements Mr. Jones, who did not appear at trial, purportedly made to police after the shooting. Because the hearsay statements were testimonial under *Davis v. Washington*, 547 U.S. 813 (2006), their admission violated Mr. Estes' constitutional right to confront the witnesses against him. The constitutional error was not harmless beyond a reasonable doubt and requires reversal of Mr. Estes' convictions.

Over a defense objection, the trial court admitted and allowed the prosecution to play to the jury a videotaped interview Ms. Young gave to a detective in December

2004. The videotaped interview was hearsay and no statute or rule of evidence authorized its admission into evidence. The erroneous admission of the videotape was not harmless and requires reversal of Mr. Estes' convictions.

After trial but before sentencing, the defense filed a motion for a new trial based on two pieces of new evidence unavailable at trial: 1) a confession by Mr. Moore that he shot Mr. Jones and a tape-recorded conversation corroborating that confession, and 2) the discovery that the prosecution had served a subpoena on someone other than the intended witness, then used the intended witness' failure to appear at trial to argue that Ms. Young was lying to the jury. Because the trial court erroneously denied the motion for a new trial, Mr. Estes' convictions must be reversed.

ARGUMENT

I. THE TRIAL COURT DENIED MR. ESTES HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND REVERSIBLY ERRED BY ADMITTING STATEMENTS MR. JONES PURPORTEDLY MADE TO POLICE SHORTLY AFTER THE SHOOTING.

A. Preservation and Standard of Review.

Defense counsel argued that the admission of Mr. Jones' hearsay statements to police officers violated Mr. Estes' right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). (v2/3/06, p5, 10-11; v2/6/06, p4-6). Appellate review of a

possible Confrontation Clause violation is *de novo*. *Vasquez v. People*, 173 P.3d 1099, 1103 (Colo. 2007).

B. Analysis.

At a pretrial motions hearing, the trial court addressed the issue of whether Mr. Estes' right to confront the witnesses against him barred the admission of statements Mr. Jones purportedly made to police after being found at his house. After the prosecution noted that Mr. Jones would likely be unavailable to testify, defense counsel argued that his statements to the officers were testimonial in nature and therefore barred by the confrontation clause under *Crawford*. (v2/3/06, p2-5). The prosecution than gave its proffer regarding the content and circumstances of the hearsay statements. According to the prosecution, an Officer Bruce was the first police officer to arrive at Mr. Jones' house and found him bleeding on his front lawn. Officer Bruce asked Mr. Jones some "basic questions" and Mr. Jones stated that he had been shot by a "light-skinned black guy, wearing a red shirt." (v2/3/06, p8). After medical personnel arrived, an Officer Nebel rode with Mr. Jones in the ambulance. Mr. Jones told Officer Nebel that he was at the park-and-ride to pick up his daughter when he was approached by two light-skinned black men who were 16 to 20 years old, approximately five feet seven inches tall, with thin builds. One man was wearing a red shirt and black bandana, while the other was wearing a black shirt and a

black bandana. The men said "give me a ride" and pointed a semi-automatic handgun at Mr. Jones; when Mr. Jones attempted to drive away, the man in the red shirt shot him. (v2/3/06, p9).

The trial court took the issue under advisement until the morning of trial. That morning, the defense noted that Mr. Jones' statements were testimonial because they were the result of questioning by the police and Mr. Jones had the presence of mind to lie to the officers, telling them he was at the park-and-ride to pick up his daughter when it was apparent the shooting actually arose from a cocaine transaction. (v2/6/06, p5-6). The court nevertheless concluded, relying on *People v. King*, 121 P.3d 234 (Colo. App. 2005), that the hearsay statements were not testimonial because they were excited utterances and it was not likely that "Mr. Jones made the statements with the anticipation that they would be used later in a prosecution." (v2/6/06, p7). The court therefore ruled the statements admissible. (v2/6/06, p8).

At trial, Officer Bruce testified to his questioning of Mr. Jones in his yard and Mr. Jones statement that he was shot by a light-skinned black man in a red shirt. (v2/6/06, p88-89). Officer Nebel testified that he questioned Mr. Jones "most of the way from the scene to the hospital," a period of approximately ten minutes. (v2/7/06, p26). According to Officer Nebel, Mr. Jones:

> Related that he was waiting in the Park & Ride, the RTD Park & Ride . . . . he was waiting to get in his Expedition for his daughter.
>
> He stated that he was approached by two black males, approximately 16 to 20 years of age, both around 5'7", thin build, light complected, pointed semi-automatic weapons at him and told him, Give me your ride.
>
> He stated that when he tried to leave, that one of the black males was wearing a red shirt, black pants and a black bandana. He said that person shot him. He was able to drive back to his house there at 4530 Atchinson Way where he collapsed on his front lawn.

(v2/7/06, p25). On further examination by the prosecution, Officer Nebel reiterated that the shooter was wearing a red shirt, black pants, and black bandana and had stated "give me your ride." (v2/7/06, p26).

The United States and Colorado Constitutions guarantee a criminal defendant the right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Colo. Const. Art. II, § 16. The Supreme Court held in *Crawford* that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unable to testify, and the defendant had had a previous opportunity for cross-examination." 541 U.S. at 53-54. The *Crawford* Court did not specifically define "testimonial," but noted that "[s]tatements taken by police officers in the course of interrogations" would qualify under even the narrowest definition of the term. *Id.* at 52. The trial court in this case, relying on the opinion of this Court in *King*, determined that Mr. Jones' statements to police officers were not testimonial

because they were excited utterances that Mr. Jones likely did not anticipate would be used in a future prosecution. (v2/6/06, p7). Neither the *King* court, nor the trial court in this case, however, had the benefit of the clarification of the meaning of testimonial that the Supreme Court subsequently provided in *Davis v. Washington*, 547 U.S. 813 (2006). The *Davis* court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.

547 U.S. at 822. Under this standard, Mr. Jones' statements to Officer Nebel were testimonial because, when questioning Mr. Jones, Officer Nebel "was not seeking to determine . . . 'what is happening,' but rather 'what happened.'" *Id.* at 830.

The decision of the District of Columbia Court of Appeals in *Lewis v. United States*, 938 A.2d 771 (D.C. 2007) is directly analogous and instructive. Police in *Lewis* responded to a 911 call from a neighbor and found an assault victim sitting bleeding in her car. Police immediately asked the victim what had happened and she gave a brief description of the assault and pointed out the defendant as her attacker. *Id.* at 774. After detaining the defendant, police asked the victim to get out of the car and

interviewed her in more depth as she sat on a nearby curb. *Id.* Relying on *Davis*, the appellate court held that the victim's initial statements were nontestimonial because they were made during an "unresolved emergency" when the circumstances were "uncertain and confused" and the assailant might have still posed a threat. *Id.* at 780-81. The officers' questions were "routine inquiries that enable the police to assess the risk of danger, ensure the safety of the victim and the community, and secure any needed medical treatment." *Id.* at 781. The statements made after the victim was removed to the curb, in contrast, were testimonial because, by that time, "the exigencies of the initial situation had subsided." *Id.* at 782. The "scene had been secured and the parties separated" and the officers' questions were designed to "investigate the incident in order to obtain information for use in a future prosecution." *Id.* (citation omitted).

Here, Mr. Jones' responses to the initial questions Officer Bruce asked him in his yard may have been nontestimonial because the officer was responding to an ongoing emergency, did not know if the assailant was still present, and needed to assess the level of danger to himself and Mr. Jones. By the time Mr. Jones was placed in an ambulance and questioned by Officer Nebel, however, that exigency had passed. While Mr. Jones' medical condition was undoubtedly dire, by the time Mr. Jones was in the ambulance, Mr. Jones was receiving medical treatment and any present,

additional danger the assailant posed to Mr. Jones or Officer Nebel had ceased. At that point, the only purpose served by questions regarding who had done the shooting was to aid in the investigation of the shooting. The statements Mr. Jones made to Officer Nebel describing the incident and the shooter, therefore, were made "to establish or prove past events potentially relevant to later criminal prosecutions" and were testimonial. *Davis*, 547 U.S. at 822. Because Mr. Jones did not testify at trial, the admission of his testimonial hearsay statements to Officer Nebel violated Mr. Estes' right to confront the witnesses against him.

A violation of the Confrontation Clause requires reversal unless it was harmless beyond a reasonable doubt. *Raile v. People*, 148 P.3d 126, 133 (Colo. 2006). In determining whether an error was harmless beyond a reasonable doubt, the Court must analyze various factors "including the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Id.* (quoting *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998)). The question is not "whether a guilty verdict would have been rendered in a trial without the error," but whether "there is a reasonable probability that the defendant could have been prejudiced by the error." *Id.* (citations omitted).

The admission of Mr. Jones' purported statements to Officer Nebel cannot be deemed harmless beyond a reasonable doubt. The case against Mr. Estes was weak, turning completely on whether the jury believed the version of events Ms. Young told the police in December 2004 over the version she gave at trial. No physical evidence indicated Mr. Estes was the shooter. Indeed there was virtually no corroboration for Ms. Young's 2004 claim that Mr. Estes had admitted to the shooting except for one thing: Ms. Young had told the detective that Mr. Estes stated he "wanted that fool's rims," (v2/7/06, p74), which coincided with Officer Nebel's testimony that Mr. Jones told him the shooter demanded "give me your ride." (v2/7/06, p26). Even with Mr. Jones' hearsay corroborating the carjacking motive described by Ms. Young, the jury deliberated three days before convicting Mr. Estes. It is unlikely the jury would have convicted without the unconstitutionally admitted hearsay. It certainly cannot be said that there is no reasonable probability that Mr. Estes was prejudiced by the admission of the hearsay. The violation of Mr. Estes' confrontation rights therefore requires reversal of his convictions.

II. THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING INTO EVIDENCE AND PLAYING TO THE JURY A VIDEOTAPED INTERVIEW OF MS. YOUNG THAT WAS INADMISSIBLE HEARSAY UNDER THE RULES OF EVIDENCE.

A. Preservation and Standard of Review.

Defense counsel objected to the videotaped interview of Ms. Young. (v2/7/06, p6-7; 100). Evidentiary issues are reviewed for an abuse of discretion, which occurs when there is no basis in the Rules of Evidence for admitting the evidence. *See Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008).

B. Analysis.

Before Ms. Young testified at trial, the parties and court discussed what portions of Ms. Young's December 30, 2004 videotaped interview with the detective, if any, would be admitted at trial. The prosecution sought to admit the entire interview so the jury could "understand the circumstances of the interview." (v2/7/06, p5). Defense counsel pointed out that such a procedure was not proper, and the trial court agreed, ruling that the prosecution could only use the videotape to impeach specific testimony by Ms. Young that was contradicted by specific statements she made in the interview. (v2/7/06, p5).

During direct examination, Ms. Young several times testified she did not recall making certain statements in the December 30 interview, and the prosecution used a transcript of the interview to impeach her. (v2/7/06, p68-69, 70, 71-72, 74, 75-76,

79-80, 82, 83, 84, 85, 91-92). As to other statements in the interview, Ms. Young recalled making them but explained that she had been lying to the detective. (v2/7/06, p72, 73, 74-75, 76-77, 79, 80). The prosecution nevertheless stopped its direct examination and asked to play the entire videotaped interview to the jury, arguing that Ms. Young had given "incorrect responses" regarding the interview and "the jury needs to see the context. . . . I think that her demeanor is relevant to their consideration of her credibility." (v2/7/06, p100). After defense counsel reiterated his objection, the trial court noted that it had been keeping track of Ms. Young's responses denying or not remembering making particular statements "because either of them would permit the playing of the transcript." The court then ruled: "the only way to do this in a logical way is to play the whole transcript. Otherwise it's going to be piecemeal and we would have to go through each statement." (v2/7/06, p101). The court then allowed the entire videotaped interview to be played to the jury. (v2/7/06, p 103).

The Colorado Rules of Evidence define hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). That general definition of hearsay includes an exception for a statement by a witness that is "inconsistent with

his testimony." CRE 801(d)(1). Hearsay is inadmissible except as provided in explicit exceptions contained in the evidence rules and statutes. CRE 802.

All the statements Ms. Young made in the December 30 interview with the detective regarding the shooting and what Mr. Estes purportedly told her were classic hearsay. Pursuant to CRE 801(d)(1), statements she made in the interview that contradicted her testimony at trial, including statements she could not remember at trial, were admissible as prior inconsistent statements. The proper procedure for admitting those prior inconsistent statements called for the prosecution to confront Ms. Young specifically with each statement she denied making or did not recall. The prosecution did this to great effect throughout Ms. Young's direct examination, using a transcript of the recorded interview. Had the prosecution been prepared to do so, it instead could have questioned Ms. Young by showing each inconsistent statement on the videotape individually after Ms. Young denied making it or remembering it.

No statute or rule of evidence, however, allowed the prosecution to play the entire videotape of the interview to the jury. The reasons urged by the prosecution and relied on by the trial court for doing so – the desire for "context" and to show a witness' demeanor – are not recognized exceptions to the rule against hearsay. Instead, if the prosecution thought it was important for the jury to understand Ms. Young's demeanor, the atmosphere of the interview, and any influence of the

presence of her mother, the prosecution was required to have Ms. Calhoun and the detective testify regarding those aspects of the interview.

The existence and operation of CRS § 13-25-129 is instructive. That statute provides that the out-of-court statements of a child victim of sexual assault "describing any act of sexual contact" may be admitted in court proceedings if the court holds a hearing outside the presence of the jury and determines that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." CRS § 13-25-129. The statute has frequently been used to admit videotaped interviews of children. *See e.g., People v. Whitman*, 2007WL4198391, *7-8 (Colo. App. 2007); *People v. Melendez*, 80 P.3d 883, 889 (Colo. App. 2003). In those cases, however, the hearsay is admissible because the court holds the hearing required by the statute and makes "detailed findings regarding facts and circumstances, including the consistency of the statements, that led it to conclude that the statements were reliable and would be admitted." *Melendez*, 80 P.3d at 889. No similar statute exists allowing the admission of a videotaped interview of a purported witness to statements regarding an attempted murder and, even if such a statute existed, the videotape in this case would not have been admissible because the court held no hearing and made no findings regarding its reliability.

Simply put, nothing in the Colorado statutes or rules of evidence authorized the admission of the videotape of Ms. Young's interview with the detective, so the district court did not have the discretion to admit it. The court's error was not harmless. This case was entirely about whether Ms. Young's statements to the detective in December 2004 were more credible than her testimony at trial, and the prosecution relied heavily on the videotape to argue that they were. The prosecution began its closing argument by stating that Ms. Young "can't get away from" her statements in the interview and arguing that her statements in the interview were the most credible: "You saw what she had to say and how she said it." (v2/8/06, p65). The prosecution then returned to the videotape again and again, further arguing:

- in that video, you got to see her demeanor. You got to see how she was responding. (v2/8/06, p67).

- And when you were watching that video, even though she was reluctant, even through her demeanor – and you got to see it – she was telling the truth. (v2/8/06, p69).

- You get to consider her demeanor here. You get to consider her demeanor in the videotape. (v2/8/06, p74).

The jury then requested and was allowed to view the videotaped interview two additional times during its three days of deliberations. (v2/8/06, p102; v2/10/06, p3). The videotape was plainly critical to the prosecution's effort to overcome the

lack of physical or corroborating evidence linking Mr. Estes to the shooting and convince the jury that the story Ms. Young told in December 2004 but subsequently recanted was the true one. The erroneous admission of the videotape therefore cannot be deemed harmless and requires reversal of Mr. Estes' convictions.

III. THE TRIAL COURT ERRED AND DENIED MR. ESTES DUE PROCESS OF LAW BY DENYING MR. ESTES' MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

A. Preservation and Standard of Review.

Mr. Estes filed his motion for a new trial after his trial but before sentencing. (v1, p65, 68). A hearing on the motion was held on June 23, 2006. (v6/23/06, p4). A trial court's denial of a defendant's motion for a new trial based on newly discovered evidence is reviewed for an abuse of discretion. *People v. Jones*, 690 P.2d 866, 868 (Colo. App. 1984).

B. Factual and Procedural Background.

1) Mr. Moore's Confession and Recorded Statements.

The defense theory at trial was that Mr. Estes did not commit the shooting, and never made the purported statements to Ms. Young implicating himself in the shooting. Instead, as Ms. Young admitted at trial, she had fabricated the statements in her interviews with police while angry with Mr. Estes and under pressure from her mother, Ms. Calhoun, who disliked Mr. Estes and wanted to protect her nephews

who had participated in the shooting, Mr. Moore and Mr. House. (v2/8/06, p77-88). Ms. Young testified at trial that she had gotten her information about the shooting from Mr. Moore and Mr. House, not from Mr. Estes. (v2/7/06, p127-38). She did not, however, testify that either Mr. Moore or Mr. House had admitted to being the shooter.

After trial, Ms. Young came forward and admitted that Mr. Moore had told her he shot Mr. Jones. Ms. Young also attempted to surreptitiously record a conversation she had after trial with Mr. Moore, in which they discussed the shooting. The audio quality of the recording is low, but Mr. Moore can be heard to say "he kept trying to stick his hand out the window so I cocked my shit again," discussing with Ms. Young whether Mr. Jones had a gun, and Ms. Young remarking that Mr. Moore had told her it "was either him or me." Later, they discuss police looking for a gun and Mr. Moore remarks that it was a "good thing I got caught with the gun I have." (v6/23/06, Ex. C).

Defense counsel filed a motion for a new trial based on the newly discovered evidence indicating that Mr. Moore was the shooter, and a hearing was held on the motion on June 23, 2006. Ms. Young testified that Mr. Moore had told her on the night of the shooting that he was the shooter. (v6/23/06, p25). Mr. Moore later said he shot Mr. Jones in self-defense because Mr. Jones was sticking his hand out the

window of his SUV and Mr. Moore believed he had a gun. (v6/23/06, p9-10). He also stated that his "big homey" had snapped in half the gun he used to shoot Mr. Jones and it would not be found. (v6/23/06, p8-9). Ms. Young also spoke with Mr. House, who confirmed that Mr. Moore was the shooter. (v6/23/06, p12). Mr. Estes was not involved in the shooting, and asked Mr. Moore why he had done it after it occurred. (v6/23/06, p11, 18). After trial, Ms. Young had attempted to record her conversations with Mr. Moore, resulting in the mostly inaudible tape which was admitted at the hearing. (v6/23/06, p7, Ex. C).

Investigator Fuller testified at the motions hearing that he interviewed Mr. Moore in 2005, at which interview Mr. Moore denied any involvement in the shooting and even denied being at the park-and-ride the day it occurred. (v6/23/06, p37). The lead detective on the case testified that he had attempted to interview Mr. Moore before Mr. Estes' trial, but that Mr. Moore's mother had denied permission for the juvenile Mr. Moore to be interviewed. (6/23/06, p46). The detective had not tried again to interview Mr. Moore after being made aware of Mr. Estes' motion for a new trial. (v6/23/06, p44-45). The detective acknowledged that Mr. Moore fit the witness descriptions of the shooter better than did Mr. Estes, and testified that Mr. Moore was "a family favorite" and the family was "very protective" of Mr. Moore. (v6/23/06, p54, 58).

Defense counsel argued that both Ms. Young's testimony that Mr. Moore had told her he was the shooter and the recordings providing corroboration for that claim constituted new evidence not available until after trial. Those facts, along with the fact that the family sought to protect Mr. Moore, provided critical support for Ms. Young's trial testimony that she made up the allegations about Mr. Estes at the behest of her mother. (v6/23/06, p57-62, 67-68). The trial court denied the motion for a new trial, stating that the evidence was not new and the defense did not exercise due diligence because Ms. Young "has been available to give this information to the defendant throughout and prior to trial" and because the defense did not attempt "to interview Mr. Moore or bring him into court." (v6/23/06, p82-83). The court noted that a confession by Mr. Moore "would be material" to the case, but opined that the evidence was "cumulative" because Ms. Young was the source of all the statements. (v6/23/06, p83). Finally, the court found that a confession by Mr. Moore would not result in an acquittal because "the confession does not exonerate the defendant" because "the evidence has always been that there was more than one person involved in this case" and Mr. Estes therefore would have been convicted under a complicity theory notwithstanding the fact that no complicity instruction was given to the jury. (v6/23/06, p84-85).

2) The Prosecution's Erroneous Examination and Argument Regarding Ms. Summers.

The prosecution attempted to subpoena for trial Kawetta Summers. Ms. Summers did not appear for trial, but the prosecution nevertheless included in its opening statements the allegation that Ms. Summers could implicate Mr. Estes in the shooting. (v2/6/06, p9, 38, 43). During the trial examination of Ms. Young, the prosecution, over a defense objection that it was irrelevant, brought out the fact that Ms. Young was present when the prosecution served a subpoena for Ms. Summers, but Ms. Young denied that the person to whom the subpoena was delivered was actually Ms. Summers. (v2/7/06, p54-57, 147). The prosecution then called to the stand its investigator, Robert Fuller, who testified that, the day before, he had found Ms. Summers at an apartment where Ms. Young was also present and had served Ms. Summers with her trial subpoena. (v2/7/06, p154). Investigator Fuller stated that he was absolutely certain he served Ms. Summers because he previously had watched a videotaped interview of Ms. Summers, and the person he served was the same person in the videotape and presented Ms. Summers' identification. (v2/7/06, p155). Investigator Fuller further stated that he knew he subpoenaed Ms. Summers because he previously had spoken with Ms. Summers on the telephone and recognized her voice when he served the subpoena. (v2/7/06, p155).

In closing argument, the prosecution argued to the jury at length that Ms. Young "sits here tells you" that the prosecution had not served Ms. Summers, but that "Kewatta Summers was served" and that "Jaqueela Young goes to that extent to lie to you about that set of circumstances . . . ." (v2/8/06, p71). In fact however, the prosecution had not served a subpoena to Ms. Summers; it had instead given her subpoena to Danielle Estes, who apparently told them she was Ms. Summers. (v6/23/06, p29). Contempt proceedings initiated against Ms. Summers for failing to appear for trial were dismissed when the prosecution realized it had never served her with a subpoena. (v3/3/06, p1-4; v3/10/06, p1).

After the contempt proceedings against Ms. Summers were dismissed, Mr. Estes filed his motion for a new trial, asserting as one ground for the new trial the fact that the prosecution had attacked Ms. Young's veracity based on investigator Fuller's testimony regarding the subpoena and Ms. Young's apparent refusal to admit that Ms. Summers had been served in her presence, when in fact Ms. Young was right about Ms. Summers not being served and the prosecution was wrong. (v1, p68-71). At the hearing on the motion, Investigator Fuller admitted "I was wrong" when he testified at trial that he was absolutely certain he had served Ms. Summers. (v6/23/06, p31). Defense counsel argued that Mr. Estes had been prejudiced because the prosecution used the supposed certainty that Ms. Summers had been served to argue that Ms.

Young was a liar and could not be believed. (v6/23/06, p62-66). The trial court denied the motion, deeming the issue "peripheral" and opining that Danielle Estes' efforts to pose as Ms. Summers would have been "more damaging to Mr. Estes' case than the manner in which the testimony actually was presented." (v6/23/06, p85-86).

C. Analysis.

A defendant is entitled to a new trial based on newly discovered evidence when the defendant establishes:

> (1) that the evidence was discovered after the trial and defendant and his counsel exercised due diligence to discover all evidence favorable to defendant prior to and during the trial; (2) that the evidence is material to the issues involved and is not merely cumulative or impeaching; and (3) that on retrial the newly-discovered evidence would probably produce an acquittal.

People v. Jones, 690 P.2d 866, 869 (Colo. App. 1984). The evidence regarding both Mr. Moore's statements to Ms. Young and the prosecution's erroneous examination and argument about Ms. Summers meets all of those criteria.

Ms. Young's testimony regarding Mr. Moore's confession and the recording she made of Mr. Moore were both unquestionably new evidence that could not have been discovered by the defense before trial. At trial, Ms. Young stated only that she had learned details of the shooting from Mr. Moore and Mr. House. She did not state, as she did after trial, that both those men had admitted to her that Mr. Moore

was the shooter. While the trial court may have been correct in stating that Ms. Young was "available to the defense" before trial, she had withheld that critical information. Ms. Young was a prosecution witness and, as she stated at trial, she wished to protect her cousins and did not believe that Mr. Estes would be convicted once she admitted to fabricating the conversations with him regarding the shooting. (v2/7/06, p77, 136). Only after Mr. Estes was convicted did Ms. Young reveal that her cousin Mr. Moore had confessed to the shooting. Contrary to the trial court's ruling, therefore, there was no way the defense could have gotten that information out of Ms. Young prior to trial because she had decided not to reveal it. *See Jones*, 690 P.2d at 869 (evidence of confession by a suspect other than defendant to third-party witness met test for newly discovered evidence where witness "testified that, because he expected defendant to be acquitted, he would not have revealed [the suspect's] admission to anyone prior to trial.").

The trial court was similarly incorrect in implying that the defense somehow could have obtained the confession from Mr. Moore. Mr. Moore was a juvenile and his mother had refused the prosecution permission to speak to him prior to trial. The defense was no more likely to be allowed to speak with Mr. Moore, much less obtain a confession from him to attempted murder. His statements to Ms. Young therefore were "newly discovered" after trial by any rational measure.

Perhaps more importantly, the tape recording of Mr. Moore's conversation with Ms. Young unquestionably could not have been discovered prior to trial. Ms. Young testified that she did not record the conversation until after Mr. Estes was convicted. That fact is made clear by the recording itself, on which Ms. Young and Mr. Moore can be heard discussing the trial, Mr. Estes' conviction, and his plan to appeal. (v6/23/06, Ex. C).

The evidence regarding Mr. Moore was certainly material. The prosecution's theory that Mr. Estes shot Mr. Jones certainly would have been undermined by testimony that Mr. Moore confessed to being the actual shooter. The trial court was wrong when it deemed the evidence "cumulative" because it came from Ms. Young. While Ms. Young had recanted her story of receiving a purported confession from Mr. Estes and admitted that she got information about the shooting from Mr. Moore and Mr. House, she never testified at trial that Mr. Moore had admitted to being the shooter and that Mr. House had confirmed that fact. The recording, moreover, was critical evidence that cannot be deemed cumulative in any sense. The entire question of Mr. Estes' guilt turned on whether the jury believed the version of events Ms. Young gave the police in December 2004 or the version she gave at trial. The mere fact that Ms. Young chose to record her conversation with Mr. Moore, hoping he would repeat his confession to shooting Mr. Jones, provided critical corroboration for

her trial testimony. The few audible statements Mr. Moore made on the recording – in which he stated he "cocked my shit again" and referenced Mr. Jones saying "it was either him or me" – provided powerful further corroboration that Mr. Moore did the shooting. They were highly material and were not cumulative of anything presented at trial.

Because they provided such powerful evidence that Mr. Moore shot Mr. Jones, Ms. Young's new testimony and the recording likely would have resulted in Mr. Estes being acquitted. Again, in the absence of any physical evidence implicating Mr. Estes, this case depended entirely on the jury's view of Ms. Young's trial testimony and her contradictory earlier statements to police. As in *Jones*, an admission that "another person had in fact been the perpetrator[ ], represents an entirely new element in the case." 690 P.2d at 869; *see also People v. Tomey*, 969 P.2d 785, 787 (Colo. App. 1998) (evidence indicating that key witness had lied was material, not merely cumulative or impeaching). The recorded conversation in which Mr. Moore appeared to acknowledge shooting at Mr. Jones made that admission extremely convincing.

Finally, there is no merit to the trial court's conclusion that the testimony and recording indicating Mr. Moore was the shooter would not have exonerated Mr. Estes because the jury could have found him guilty as a complicitor. This is not a case like *Mason v. People*, 25 P.3d 764 (Colo. 2001), in which the defendant pled guilty and

admitted to wielding a knife at the victim, so the court could conclude that the defendant would be found guilty as a complicitor at any future trial notwithstanding another man's admission to actually stabbing the victim. *Id.* at 768. Mr. Estes had a trial. The prosecution did not proffer a complicity theory at that trial, nor did the trial court instruct the jury on the law of complicity, so there is absolutely no chance the jury that heard Mr. Estes' trial would have convicted him as a complicitor. Moreover, the evidence at trial established that the shooting arose from a very brief confrontation between Mr. Jones and the shooter. Even if it was proper for the trial court to assume a hypothetical trial in which the jury was instructed on the law of complicity, therefore, it simply cannot be said that a jury would have found beyond a reasonable doubt that Mr. Estes was present, had "the intent to promote or facilitate the commission of the offense," and somehow aided, abetted, advised or encouraged Mr. Moore in the commission of the offense, as would be required to be guilty under a complicity theory. CRS § 18-1-603.

The case the prosecution presented was about whether or not Mr. Estes shot Mr. Jones. The testimony of Ms. Young and the recording of Mr. Moore that were not available until after trial were powerful evidence that he did not. The trial court therefore erred by refusing to grant Mr. Estes a new trial after those critical pieces of evidence came to light.

The trial court also erred by refusing to grant a new trial based on the newly discovered evidence regarding the purported service of a subpoena on Ms. Summers. The evidence was clearly "new," as the prosecution did not even know, until after it initiated post-trial contempt proceedings, that it had in fact served a subpoena on someone other than Ms. Summers. The evidence was also material. It was not cumulative in any way, nor was it merely "impeaching." *Jones*, 690 P.2d at 869. On the contrary, the evidence would have had the opposite effect of dispelling the prosecution's main theory of the case – that Ms. Young was not telling the truth at trial.

Finally, telling the jury the true story regarding the supposed service of Ms. Summers likely would have changed the outcome of the trial. Contrary to the trial court's conclusion that the issue was "peripheral," the credibility of Ms. Young at trial was the critical issue in the case. The prosecution highlighted Ms. Young's insistence that the prosecution had served a subpoena on someone other than Ms. Summers, and aggressively used Investigator Fuller's absolute certainty that he had served a subpoena on Ms. Summers in Ms. Young's presence, to impugn Ms. Young. Indeed, the prosecution went so far as to explicitly argue that Ms. Young's denial that Ms. Summers had been served made Ms. Young a liar. In a case where convincing the jury that Ms. Young was lying at trial was the only way for the prosecution to secure a

conviction, the importance of the subpoena issue cannot be overstated. As it was, it took the jury three days of deliberations to reach a guilty verdict. *See* (v2/8/06, p97-102; v2/9/06, p2-3; v2/10/06, p2-7). A trial in which the jury knew that Ms. Young did not "lie to you about that set of circumstances" would have had a different outcome, especially if the jury had also heard the new evidence regarding Mr. Moore's confession to Ms. Young and their recorded conversations. The denial of the motion for a new trial denied Mr. Estes due process of law and requires reversal of his convictions.

CONCLUSION

Wherefore, based on the foregoing argument and authorities, Defendant Jonathan Estes respectfully requests that this Court reverse his convictions and remand the matter for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on November 20, 2008, a copy of this Opening Brief of Defendant-Appellant 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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