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| COURT OF APPEALS<br>STATE OF COLORADO<br><br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202 | |
| Morgan County District Court<br>Honorable Kevin L. Hoyer, Judge<br>Case No. 10CR156 | |
| THE PEOPLE OF THE STATE OF COLORADO,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JOSHUA PATRICK BENITEZ,<br><br>Defendant-Appellant. | ▲ **COURT USE ONLY** ▲<br>Case No. 11CA1074 |
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| **PEOPLE'S ANSWER BRIEF** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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**For the party responding to the issue:**

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Patricia R. Van Horn

Patricia R. Van Horn

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The defendant, Joshua Patrick Benitez, appeals the judgment of conviction entered upon jury verdicts finding him guilty of menacing and prohibited use of a weapon while intoxicated.

## STATEMENT OF THE CASE AND OF THE FACTS

The defendant was charged with menacing and prohibited use of a weapon, after an off-duty deputy sheriff reported that the defendant, who was sitting in a vehicle the parking lot of a fast food restaurant, had pointed a rifle at him and his family, who were sitting next to a window in the restaurant. (v. 1, pp. 9-10; CD 3/7/11 pp. 47-67).

Before trial, the court granted the prosecution's request to admit evidence that the defendant had been an inmate at the jail where the deputy worked. The court found that the evidence was admissible under CRE 404(b) to show "motive or reason for the defendant's alleged criminal conduct" and as res gestae "to provide the jury with a full understanding of the events surrounding the alleged crime." (v. 1, pp. 43-47).

The defendant did not testify at trial. His theory of defense, as presented in closing argument, was that he had not pointed the rifle at the deputy; rather, the deputy had become enraged and confronted him in the parking lot because he had given the deputy "the stink eye" in the restaurant. (CD 3/8/11, pp. 193-199).

In addition to the charged offenses, the court instructed the jury on another charge, prohibited use of a weapon while intoxicated, as a lesser non-included offense at the defendant's request. (CD 3/8/11, pp. 154-155). After the jury could not reach a verdict on the original charge of prohibited use of weapon, it was dismissed at the prosecution's request. (*Id.*, pp. 233; v. 1, p. 97). The defendant was convicted of menacing and prohibited use of a weapon while intoxicated and he was sentenced to two years in the Department of Corrections. (v. 1, p. 108; CD 4/8/11, pp. 16-17).

The defendant now appeals the judgment of conviction, arguing the following: (1) the trial court erred in admitting evidence, over his objections, of his prior incarcerations in the jail where the deputy worked; (2) the trial court committed plain error in admitting evidence

that he remained silent when he was taken into custody at the scene; (3) the trial court erred in admitting evidence that ammunition was found in the vehicle and on his person; and (4) the court's evidentiary errors constitute cumulative error, which warrants reversal.

## SUMMARY OF THE ARGUMENT

The trial court properly admitted evidence that the defendant had been incarcerated at the jail where the deputy worked. The probative value of the evidence was high and it did not suggest a verdict on an improper basis. It was offered and admitted to show the defendant's mental state and as evidence of the defendant's motive to menace the deputy with the rifle, explaining why the defendant would point a rifle at a man eating dinner with his family.

The trial court did not commit plain error when it admitted evidence that the defendant did not make a statement to the officers when he was taken into custody. The evidence and the prosecutor's statements regarding the evidence were an insignificant part of the trial. The prosecutor did not use the evidence to create an inference of

guilt but to rebut the testimony of the defendant's friend, who was called as a prosecution witness, that he saw a group of men chasing the defendant through the parking lot. Further, the prosecutor did not imply that the defendant's failure to make a statement meant that he was guilty.

Evidence that ammunition for the rifle was found in the vehicle was relevant as it refuted the defendant's suggestion that he could not have pointed the rifle at the deputy because it was in pieces. It was not unfairly prejudicial as the jury would not have been shocked to hear that a vehicle containing a rifle also contained ammunition.

There was no cumulative error warranting reversal.

## ARGUMENT

### I. The trial court properly admitted evidence that the defendant had been incarcerated in the county jail where the deputy worked.

The defendant contends that the trial court erred in admitting evidence that he had been incarcerated in the county jail where the deputy worked.

### A. Background

Before trial, the prosecution filed a notice of intent to introduce, as res gestae or under CRE 404(b), evidence that the defendant had been incarcerated in the county jail were the deputy worked. (v. 1, pp. 31-32).[1] Following a hearing at which defense counsel argued that the evidence was inadmissible because there was no evidence that the defendant actually recognized the deputy and that any probative value of the evidence was outweighed by its prejudicial effect (CD 12/2/10, pp. 27-28, 63-67), the trial court issued a written order granting the prosecution's request to admit the evidence, finding it was admissible under CRE 404(b) and as res gestae. (v. 1, pp. 43-47).

On the first day of trial, the court stated that it wanted to "have some ground rules regarding mentioning the prior incarceration and convictions." (CD 3/7/11, p. 31). Defense counsel said she planned to "elicit the basics"; i.e., the dates of incarceration and the nature of the

[1] The defendant asserts that he filed a motion in limine to preclude the admission of the evidence of his incarceration. But the pleading to which he cites is a generic "notice of objection" to any CRE 404(b) or res gestae evidence. (v. 1, p. 27).

defendant's offenses because she wanted "the jury to know what kind of priors we are dealing with, rather than make them speculate as to what they might be." (*Id.*, p. 32). The prosecutor said that she intended to ask the deputy how long he had worked at the jail and whether he recognized the defendant from the jail. (*Id.*).

At trial, in response to the prosecutor's questions, the deputy described his duties at the jail and what had happened during the charged incident. He said that he had thought he recognized the defendant and, once he had returned to work, he had pulled the defendant's file and had realized that the defendant was "a prior arrestee" and that he "recognized him from being in custody." (CD 3/7/11, pp. 74-75).

On cross-examination, defense counsel elicited testimony from the deputy regarding the defendant's dates of incarceration at the jail and the crimes for which he had been incarcerated. The deputy agreed with defense counsel that there was no indication in the defendant's file that he and the defendant had any interactions at the jail. (*Id.*, pp. 86-89).

### B. Standard of Review

The People agree in part with the defendant's standard of review. A trial court has substantial discretion in determining the admissibility of evidence and in weighing its probative value against its prejudicial effect. *People v. Rath*, 44 P.3d 1033 (Colo. 2002); *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004). Under this standard, a trial court's evidentiary ruling will not be overturned unless the ruling was manifestly arbitrary, unreasonable, or unfair, and any error was not harmless. *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007).

But the People disagree that any error in the admission of the evidence implicated the defendant's constitutional rights. *Yusem v. People*, 210 P.3d 458, 469-70 (Colo. 2009); *People v. Griffiths*, 251 P.3d 462, 466 (Colo. App. 2010). Thus, any error must be analyzed under the harmless error standard, rather than beyond a reasonable doubt standard. *People v. Herron*, 251 P.3d 1190, 1195-96 (Colo. App. 2010); *see also Fletcher*, 179 P.3d at 976. An evidentiary error is harmless where, viewing the evidence as a whole, it did not substantially

influence the verdict or impair the fairness of the trial. *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006).

### C. Analysis

The defendant asserts that evidence that he had been incarcerated at the jail where the deputy worked was irrelevant because the prosecution did not establish that the defendant had recognized the deputy or "how [the defendant] would have a motive to menace [the deputy] even if he did recognize [him] from the jail." (Def.'s Brief at 15). He also argues that even if the evidence had been relevant, it was unfairly prejudicial because the jury learned of his prior criminality and the court failed to issue a limiting instruction.

All relevant evidence is admissible unless specifically excluded by constitution, statute, or rule. CRE 402; *Rath*, 44 P.3d at 1038. Relevant evidence is that 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; *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995).

But even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403. Evidence is unfairly prejudicial if it has an "undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror." *James*, 117 P.3d at 93-94. For evidence to be excludable on this basis, the danger of unfair prejudice must substantially outweigh the legitimate probative value of the evidence. CRE 403.

Generally, "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." CRE 404(b). But such evidence may be admissible for other purposes, namely, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. CRE 404(b); *Rath*, 44 P.3d at 1038.

In addition, while "[e]vidence of a defendant's prior criminal acts is inadmissible to prove that a defendant committed the crime for which he or she is charged," evidence of other acts that are part and parcel of the criminal episode may be admissible as res gestae of the offense.

*People v. Lucas*, 992 P.2d 619, 624 (Colo. App. 1999). Res gestae evidence "is admissible to provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred." *People v. Quintana*, 882 P.2d 1366, 1373 (Colo. 1994). Such evidence "is admissible so long as it is relevant and its probative value is not substantially outweighed by the probability of unfair prejudice to the accused." *People v. Czemerynski*, 786 P.2d 1100, 1109 (Colo. 1990).

Here, the trial court properly admitted evidence that the defendant had been incarcerated at the jail where the deputy worked because such evidence was relevant and admissible either under general relevancy rules or as res gestae. It was offered and admitted to show the defendant's mental state and as evidence of the defendant's motive to menace the deputy with the rifle, explaining why the defendant would point a rifle at a man eating dinner with his family. *People v. Gladney,* 250 P.3d 762, 768 (Colo. App. 2010) (evidence that homicide victim and defendant were involved in a disputed drug deal admissible as res gestae to explain defendant's actions). Although the

prosecution is not required to prove motive, showing a defendant's motive is a "well-accepted method [ ] of proving the ultimate facts necessary to establish the commission of a crime." *People v. Cousins*, 181 P.3d 265, 371 (Colo. App. 2007). The fact that the prosecution could not conclusively prove that the defendant actually had recognized the deputy from the jail does not mean that the jury could not infer that he had recognized him and such lack of proof went to the weight of the evidence, rather than its admissibility. *See People v. Vialpando*, 804 P.2d 219, 224 (Colo. App. 1990) (evidence that the sex assault victim received a threatening telephone call was admissible, even though the identity of the caller was uncertain).

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See Rath*, 44 P.3d 1043 (a court must give evidence its maximum probative value and its minimum unfair prejudicial value). As previously explained, the probative value of the evidence was high as it provided an explanation for the defendant's otherwise inexplicable actions, and it did not suggest a verdict on an improper basis. And because the evidence was

admissible as res gestae, the trial court was not required to provide a limiting instruction. *People v. Martinez*, 24 P.3d 629, 633 (Colo. App. 2000).

Accordingly, the trial court properly admitted evidence of the defendant's prior incarcerations at the county jail.

## II. The trial court did not commit plain error when it permitted two police officers to testify that the defendant had not said that a group of men had been chasing him through the parking lot.

The defendant contends that the trial court improperly admitted evidence that he remained silent after his arrest, which he asserts violated his privilege against self-incrimination and his right to due process.

### A. Background

In opening statement, defense counsel said that the defendant's friend, Rinaldo Jasso, had seen four men "charging toward" the defendant in the restaurant parking lot. (CD 3/7/11, pp. 43-44).

Jasso was called as a prosecution witness. He testified that he was sitting in his vehicle outside the restaurant waiting for the

defendant and he saw four or five men chasing the defendant through the parking lot. (CD 3/7/11, pp. 161-165). After Jasso testified, the prosecution called two police officers who had arrived at scene, Officer Kaber and Officer Malave. In relevant part, the officers testified as follows:

> **Pros.:** Okay. Now, once you got out of your vehicle, what did you do?
>
> **Kaber:** I assisted Sergeant Padgett in – we handcuffed Mr. Benitez.
>
> **Pros.:** And did Mr. Benitez make any statements to you?
>
> **Kaber:** He did not.
>
> **Pros.:** Did he make any statements about any guys chasing him?
>
> **Kaber:** He did not.

(CD 3/8/11, pp. 15-16).

> **Pros.:** Okay. Now, you said you placed, um, the suspect in your patrol car?
>
> **Malave:** Yes, ma'am.
>
> **Pros.:** Did he make any statements to you?
>
> **Malave:** No.
>
> **Pros.:** Okay. He didn't say anything about people chasing him?
>
> **Malave:** No.

(*Id*. at 67).

The defense called its investigator, who had interviewed Jasso. The defense investigator testified that Jasso had told her that he had seen the defendant "running through the parking lot as if from a herd of bulls." (CD 3/8/11, pp. 142-143). The defendant did not testify.

In closing argument, the prosecutor discussed Jasso's testimony (but not his testimony about the men chasing the defendant) and then made the following comments, which drew no objection, about the testimony of the two officers:

> What about Officer Kaber? He was the first on the scene. He told you that. He handcuffed the Defendant after he confronted him and helped Sergeant Padgett. He took the rifle from Ray Padgett. He did a search of the Explorer. We talked about that. He never heard any statements from Joshua Benitez about men chasing him or about him – his needing to get away, somebody was after him.
>
> What about Pedro Malave? He was the second on the scene. He transported the Defendant to the detention center. He never heard any statements from the Defendant. He took measurements from the Explorer, and determined that it was approximately 70 feet – and that's consistent with what every other witness testified to – about 70 feet from the door of McDonald's to where the Explorer was parked.

(CD 3/8/11, pp. 180-181).

The prosecutor did not comment on the challenged evidence during rebuttal closing argument. (*Id.*, pp. 119-207).

### B. Standard of Review

The People agree with the defendant's standard of review. The defendant did not object to the testimony he now challenges. As such, this Court reviews the alleged errors for plain error. *See* Crim. P. 52(b); *People v. Sommers*, 200 P.3d 1089, 1095 (Colo. App. 2008).

Unpreserved error only rises to the level of plain error when it is both obvious and substantial and, after a review of the entire record, an appellate court can conclude with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *People v. Taylor*, 159 P.3d 730, 738-39 (Colo. App. 2006).

### C. Analysis

While it appears that the defendant was under arrest when Officer Kaber handcuffed him and while he was in Officer Malave's patrol car, the record does not indicate whether the defendant received

a *Miranda* advisement before he was handcuffed and placed in the patrol car. In any event, using a defendant's post-arrest, pre-*Miranda* silence or post-*Miranda* silence as substantive evidence of guilt may violate the defendant's due process rights and Fifth Amendment privilege against self-incrimination. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983); *People v. Herr*, 868 P.2d 1121, 1124 (Colo. App. 1993).

But not every reference to a defendant's silence constitutes reversible error; the determining factors are: (1) whether the defendant's silence was used by the prosecution as a means of creating an inference of guilt, and (2) whether the prosecution argued that the defendant's silence constituted an implied admission of guilt. *People v. Rodgers*, 756 P.2d 980, 984 (Colo. 1988); *People v. Key*, 522 P.2d 719, 720 (Colo. 1974); *People v. Petschow*, 119 P.3d 495, 506 (Colo. App. 2004); *People v. Ashton*, 661 P.2d 291, 294 (Colo. App. 1982); *People v. Cornelison*, 616 P.2d 173, 176 (Colo. App. 1980).

Here, the record reflects that the prosecutor elicited the challenged testimony not as substantive evidence of the defendant's

guilt or to create an inference of guilt, but to rebut Jasso's testimony that he had seen a group of men chasing the defendant. In addition, the prosecutor did not argue, or even imply, that the defendant's failure to make a statement to the officers constituted an implied admission of guilt. Instead, her two brief references to the defendant's failure to make a statement occurred during the portion of her argument when she discussed how Jasso's testimony, some of which was consistent and some of which was inconsistent with his prior statements and the testimony of the other witnesses, should be weighed against the other evidence presented in the case. (CD 3/8/11, pp. 180-181).

Further, the defendant does not now argue that the prosecutor's comments were improper; rather, his argument focuses solely on the testimony of the two officers. And, given that he also did not object to these comments at trial, it appears that he did not view these comments as glaringly improper or overly damaging at trial. *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990) ("[t]he lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging"). Perhaps

defense counsel did not view these comments as particularly damaging because whether the defendant had said that he had been chased by a group of men was tangential to the issue for the jury's resolution and insignificant in light of the defense theory, which did not rely on whether the defendant had been chased by a group of men. The theory of defense was that the deputy had followed the defendant into the parking lot and confronted him simply because the defendant had been staring at him. In support of that defense, defense counsel argued that it would have been impossible for the deputy to have seen the defendant pointing a rifle from 70 feet away in a car parked in a busy parking lot at 10 p.m.; and that the deputy, who was unarmed, would not have left the restaurant to confront the defendant had he actually him seen him pointing a rifle, but instead would have directed his family to move away from the window and called 911. (CD 3/8/11, pp. 189-199).

Finally, given that the jury was unable to reach a verdict on one of the three counts indicates that the prosecutor's comments did not have the effect of inducing the jury to decide the case based on the

defendant's failure to make a statement during, or shortly after, his arrest.

Under these circumstances, any error could not have so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the defendant's conviction. *See Taylor*, 159 P.3d at 738-39. As such, there was no plain error warranting reversal. *See Petschow*, 119 P.3d at 506 (no plain error where the district court did not sua sponte prohibit the witness from testifying as to the defendant's post-arrest silence where the testimony was limited, did not demonstrate defendant's guilt, and was not expanded on by the prosecution).

### III. The trial court did not err in admitting evidence that bullets were found in Jasso's vehicle and on the defendant's person.

The defendant asserts that the trial court committed plain error in admitting evidence that there were bullets in a partially opened box in Jasso's vehicle and a bullet, which could not be used in his rifle, in the defendant's pocket.

### A. Background

Officer Kaber testified, without objection, that there were no bullets in the rifle; that he found a bullet, which could not be used in the rifle, in the defendant's pocket; and that he found other ammunition in the vehicle; specifically, a box containing two to three hundred bullets and fifteen to twenty bullets loose bullets, all of which could be used in the rifle. (CD 3/8/11, pp. 19-20). When the prosecutor moved for admission of one of the bullets as Exhibit 3, the defense objected on relevancy grounds. The prosecutor explained that Exhibit 3 was one of the bullets that fit the rifle, and the court overruled the objection and admitted it into evidence. (*Id.*, p. 27). Before the ammunition and photographs displaying the interior of the vehicle were admitted into evidence, Kaber again described, without objection, the ammunition that was recovered from the vehicle and its location within the vehicle. (*Id.*, pp. 29-38).

Later, the prosecutor asked Sergeant Cantin, who had also responded to the scene, about the ammunition that was recovered from the vehicle. Cantin testified that he "located several .22 caliber bullets

on the floor in the front sears, about a half-empty box of .22 caliber bullets on the front floorboard between the driver and passenger seat." (CD 3/8/11, p. 118). Defense counsel objected, arguing, "I will object at this point to cumulative. We have had several officers testify about the bullets that were found, and, frankly bullets are not an element that go to menacing. We have heard this testimony over and over. I will just object to cumulative, at this point, and ask him to move on." (*Id*., pp. 118-119). The court overruled the objection, stating it would allow the testimony "as long as we don't spend too much time going over the same things." (*Id*., p. 119). The prosecutor resumed her questioning, but moved on to a different topic. (*Id*., pp. 119-121).

The defendant now argues that evidence of the ammunition that was found on his person and in the vehicle was irrelevant and unfairly prejudicial and that his objection to Exhibit 3 on relevancy grounds was sufficient to preserve his claim that the evidence was not relevant.

### B. Standard of Review

The People agree in part with the defendant's standard of review. A trial court's decision to admit evidence is reviewed for an abuse of

discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Melillo*, 25 P.3d 769, 773 (Colo. 2001). The People do not agree that the defendant's relevancy objection to Exhibit 3 was sufficient to preserve his appellate claims given that it came after Officer Kaber's description of the ammunition that was found on the defendant's person and in the vehicle. As such, his claims must be reviewed for plain error. Plain error occurs in this context only when the court "can say with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction" and "the record must reveal that there is a reasonable possibility that the error contributed to the conviction." Crim. P. 52(b); *James*, 40 P.3d at 46.

### C. Analysis

The trial court properly admitted evidence that ammunition for the rifle was found in Jasso's vehicle.

First, the evidence was relevant. The defense asserted in opening statement that the defendant had found the rifle "in a lot of pieces"

under a bale of hay on his grandmother's farm on the morning of the incident and that he had pulled pieces of the rifle out of his pockets when he returned to Jasso's vehicle after leaving the restaurant. (CD 3/7/11, pp. 42-43). By asserting that the rifle was in pieces, the defendant suggested that he could not have aimed it at the deputy. The prosecution was entitled to rebut that inference with evidence that the defendant had ammunition for the rifle, which made it more likely that the rifle was assembled. *See People v. Davis*, 2010 Colo. App. LEXIS 695 (Colo. Ct. App. May 27, 2010). Therefore, the evidence was relevant. CRE 401 (relevant evidence is that 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.").

Second, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. It is certainly not unusual for a person who has a rifle to also have ammunition for the rifle and, thus, the jury in this case would not have been surprised or shocked to hear that there was ammunition in the vehicle. The

evidence therefore could not have been expected to unfairly prejudice the defendant. As such, it was not excludable under CRE 403. *See James*, 117 P.3d at 93-94 (evidence is unfairly prejudicial and thus excludable under CRE 403 if it has an "undue tendency to suggest a decision on an improper basis … such as sympathy, hatred, contempt, retribution, or horror.").

Finally, evidence that Jasso had a bullet in his pocket that did not fit the rifle may not have been probative of any fact of consequence, but any error in its admission was not "obvious," "substantial," and "grave" and, thus, did not constitute plain error warranting reversal. *People v. Malloy*, 178 P.3d 1283, 1288 (Colo. App. 2008).

Accordingly, the trial court did not commit reversible error in admitting evidence of the ammunition.

## IV. There was no cumulative error requiring reversal.

Lastly, the defendant contends that he is entitled to a new trial because of cumulative error.

### A. Standard of Review

The defendant does not provide a standard of review or a statement regarding preservation. Whether cumulative error has denied a defendant a fair trial is a legal issue reviewed de novo. *People v. Rincon*, 140 P.3d 976, 984 (Colo. App. 2005).

### B. Analysis

A defendant is entitled to a fair trial, not a perfect trial. *People v. Rivera*, 56 P.3d 1155, 1168 (Colo. App. 2002) (any error that is harmless does not deprive a defendant of a fair trial). The doctrine of cumulative error applies only if numerous errors were actually committed, not merely alleged. *People v. Rivers*, 727 P.2d 394, 401 (Colo. App. 1986). Cumulative error requires reversal only if, in the aggregate, it shows the absence of a fair trial. *Rivera*, 56 P.3d 1155. When the court finds the absence of reversible error with respect to a defendant's claims, there is no cumulative error. *People v. Gordon*, 32 P.3d 575, 581-82 (Colo. App. 2001). And where the record does not reflect an unfair trial, there is no cumulative error requiring reversal. *People v. Caldwell*, 43 P.3d 663, 673 (Colo. 2001).

Though alleged, the defendant has failed to prove evidentiary or constitutional errors at trial and he has failed to demonstrate how the alleged errors deprived him of a fair trial. The record reveals that he received a fair trial in which his constitutional rights were safeguarded. Therefore, there was no cumulative error requiring reversal.

## CONCLUSION

For the foregoing reasons and authorities, the judgment of conviction should be affirmed.

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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **JON W. GREVILLIUS**, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 12th day of October, 2012.

*/s/ C. D. Minor*