COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Morgan District Court Honorable Kevin L. Hoyer Case Number 10CR156	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. JOSHUA PATRICK BENITEZ Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender Jon W. Grevillius, #41168 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 11CA1074
JOSHUA BENITEZ'S REPLY BRIEF	

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CERTIFICATE OF COMPLIANCE	

I hereby certify that this reply 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 reply brief complies with C.A.R. 28(g).

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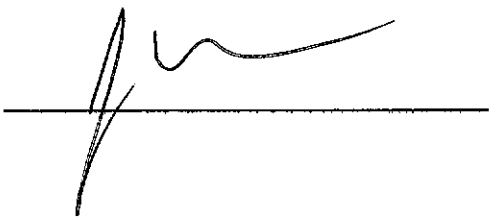

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Joshua Benitez submits the following Reply Brief.

ARGUMENT

I. Admission of evidence that Mr. Benitez had been previously incarcerated in the Morgan County jail constituted reversible error because it had no bearing on whether Mr. Benitez menaced Padgett and its admission prejudiced his right to a fair trial and violated CRE 402, 403, and 404(b).

The trial court admitted evidence that Mr. Benitez had previously been incarcerated in the county jail, where Padgett served as a sheriff's deputy, in order to show "motive or a reason for [Mr. Benitez's] conduct." (vI,45) The court admitted this evidence despite stating, following the motions hearing on the admissibility of this evidence, that it did not "know" whether Mr. Benitez recognized Padgett "based upon the testimony that's been presented [at the hearing] . . . ." (12/2/10,70) And, as Padgett twice admitted at trial, Mr. Benitez did not believe that Padgett was a sheriff's deputy. (3/7/11,68,82-83) Thus, the court correctly recognized, following trial, that it was "really pretty abundantly clear" that Mr. Benitez did not know or recognize Padgett during the incident. (4/8/11,12-13) Despite twice stating that it would provide limiting instructions to the jury, the trial court failed to do so. (vI,6)

In arguing that the prior incarceration evidence here was relevant to show motive to menace, the State offers little explanation other than "[t]he fact that the prosecution could not conclusively prove that the defendant actually 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." (AB,11)

The State altogether fails, however, to address the following:

A. The State bears the burden of establishing the admissibility of prior bad acts and failure to meet this obligation is a not a problem of evidentiary "weight."

The State's suggestion that the prior incarceration evidence should have been admitted simply because the jury could have inferred antecedent facts required for relevance and that the prosecution's failure to establish these facts goes to weight rather than admissibility was rejected by our supreme court in *People v. Garner*:

> To submit other-crime evidence to the jury merely because the jury could reasonably find the existence of the conditional fact by a preponderance of the evidence creates a substantial risk that, regardless of the jury's ultimate determination of the conditional fact, the jury might well convict the defendant not on the basis of the strength of the prosecution's case but because the defendant is a person of bad character.

806 P.2d 366, 372 (Colo. 1991).

The evidence's proponent alone must demonstrate that the evidence is relevant and admissible. *See Yusem v. People*, 210 P.3d 458, 464 (Colo. 2009). The State fails to understand that failure to provide evidence that Mr. Benitez recognized Padgett (or had motive to menace) is not a problem of evidentiary weight but is a problem of relevance and unfair prejudice of which the court, not the jury, is the decider. *Garner*, 806 P.2d at 369-70. If the prosecution fails to make any showing that Mr. Benitez recognized Padgett then the evidence is irrelevant and inadmissible. And, even if relevant, its probative value is so minimal and prejudicial value so high that it should have been excluded from trial.

As the prosecution eventually—and correctly—recognized, along with the trial court, inferring that Mr. Benitez recognized Padgett and had motive to menace would be an exercise in pure speculation (against the weight of evidence), which the jury, and the court when determining admissibility, cannot do. *People v. Quintana*, 665 P.2d 605, 611 (Colo. 1983) ("Evidence that is so remotely related to an issue as to afford only conjectural inferences should not be admitted.") (citing *People v. Botham*, 629 P.2d 589 (Colo. 1981)).

B. The prosecution conceded in closing that the jury could *not* infer motive or that Mr. Benitez recognized Padgett and that doing so would require the jury "to speculate."

During its closing argument, the prosecution argued:

> Now, what isn't there in the elements? What wasn't there in the elements that I needed to prove to you beyond a reasonable doubt in Felony Menacing or in the Prohibited Use of a Weapon? You did not see the element of motive. *I don't have to prove to you why he did what he did. Speculation. Not my job. You can't speculate about it.*
>
> It's not part of the elements. It doesn't matter why he did what he did. All that matters is that he pointed a firearm, a deadly weapon, at Sergeant Padgett and his family. He aimed a firearm.
>
> Again, there's no element of why. It's not my job to prove to you why he did it. There is no element. You don't need to wonder about that. That can just leave your mind.

(3/8/11,188) (emphasis added) It repeated this during rebuttal:

> And as to motive, my co-counsel, Ms. Wiard, explained that. It's not an element of the crime. But Barney Padgett explained to you that somebody pointed a gun at him. And when he got to work, he recognized that face. He knew he recognized the face. So he did what many of us would do. He tried to figure out where. "How do I recognize this person that would point a gun at me?"
>
> So he looked him up. He realized that he had been incarcerated with him, and that he knew him from the jail.
>
> . . .

> He recognized him, so he was curious. *Is that the motive? I don't know, because we can't speculate. But Mr. Padgett was just saying he knew him from somewhere.*

(*Id.*,206-207)

Noticeably absent from the prosecution's closing argument was any suggestion that the jury could infer that Mr. Benitez recognized Padgett or that he had motive to menace. The prosecution, instead, argued the opposite: the inference that Mr. Benitez recognized Padgett (or had motive to menace) would be based on speculation and not the evidence at trial. (*Id.*,188,206-207) The State's position on appeal stands in stark contrast to the parties' understanding below (as demonstrated through closing arguments) as well as that of the trial court, which stated at sentencing:

> I think it was fairly clear that what Mr. Benitez did was he pointed a firearm at an individual, but he did not know that Sergeant Padgett was a law enforcement officer. I think that was really pretty abundantly clear at the trial.
>
> . . .
>
> I don't think that what Mr. Benitez did was directed at Sergeant Padgett as a law enforcement officer. I just think it was a random act of stupidity is what it amounts to. It could have been anyone sitting in the McDonald's restaurant at that time.

(4/8/11,13)

The State therefore asks this Court to affirm because it believes that the jury could have speculated—against the weight of the evidence and contrary to its position

below in closing argument—that Mr. Benitez recognized Padgett. Its position is without merit.

C. The evidence was not admissible as *res gestae* because (1) Mr. Benitez did not recognize Padgett, (2) the prosecution never established that the prior incarceration was contemporaneous with the charged offense, (3) and the prosecution effectively conceded that the evidence was unnecessary to provide the jury a "complete story," and therefore the evidence was not "inextricably intertwined" with the alleged menacing.

Crucially, the State did not seek to introduce evidence that Mr. Benitez recognized or knew Padgett but, instead, introduced evidence that Mr. Benitez was *previously incarcerated* in the jail in which Padgett worked. On appeal, it maintains that this prior incarceration evidence was admissible as *res gestae*. (AB9-10) This argument fails.

"*Res gestae* evidence is the antithesis of CRE 404(b) evidence. Where CRE 404(b) evidence is independent from the charged offense, *res gestae* evidence is linked to the offense." *People v. Quintana*, 882 P.2d 1366, 1373 n. 12 (Colo. 1994). Prior bad act evidence admissible under CRE 404(b) concerns acts occurring at different times and under different circumstances than the conduct charged. *Id.* (citations omitted). *Res gestae*, on the other hand is "inextricably linked to the charged offense" and "necessary to complete the story of the crime." *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983), *cited in People v. Quintana*, 882 P.2d 1366, 1372 (Colo. 1994).

Res gestae evidence must be contemporaneous with the charged conduct, *People v. Medina*, 51 P.3d 1006, 1012 (Colo. App. 2001) ("Evidence that is not contemporaneous with the crime charged and does not illustrate its character is not part of the *res gestae.*") (citing *People v. Frost*, 5 P.3d 317 (Colo. App. 1999)), and must also be relevant and not unfairly prejudicial. *Quintana*, 882 P.2d at 1374.

The prior incarceration evidence was not "inextricably intertwined" with the charged conduct and was not necessary to provide the jury with "a complete story of the crime" because the evidence was irrelevant and did not tend to show motive, as the prosecution ultimately conceded below. That the prosecution did not rely on the evidence for context or any other permissible purpose underscores this point. Moreover, the State fails to show that the prior incarceration was reasonably contemporaneous with the charged conduct.

On appeal, the State ignores these salient facts and simply maintains, without analysis or support, that the prior incarceration evidence "provided an explanation for the defendant's otherwise inexplicable actions." (AB,11) This, however, is precisely the problem because, without evidence of motive and evidence that Mr. Benitez recognized Padgett, the jury could have found, using the prior incarceration evidence, Mr. Benitez's actions here explicable: he is a repeat law-breaker and so committed this act of menacing out of criminal propensity. *See United States v. Scott*, 677 F.3d 72, 84-85

(2d Cir. 2012) (addressing evidence that police had previously spoken with the defendant and concluding that the evidence was not "inextricably intertwined" with the charged conduct (drug distribution) and that it was reversible error to admit it). The jury was permitted to make this improper inference because the court did not provide limiting instructions on how the prior incarceration evidence could be used. *See People v. Spoto*, 795 P.2d 1314, 1321 (Colo. 1990).

The State's assertions that the incarceration evidence was relevant and necessary to provide the jury with a complete picture of the act are belied by the record and contrary to its position below at trial. For the reasons provided in the Opening Brief and above, this Court should reverse.

II. By eliciting evidence of Mr. Benitez's post-arrest silence, which it referred to twice in closing argument, the prosecution improperly used Mr. Benitez's post-arrest silence to "create an inference of guilt," and, under *People v. Ortega*, this constituted reversible error.

The State maintains that the prosecution did not elicit evidence of Mr. Benitez's post-arrest silence "as substantive evidence of the defendant's guilt or [to] create an inference of guilt." (AB,16-17) Instead, it asserts that the prosecutor used Mr. Benitez's silence to rebut its *own* witness's testimony, elicited on direct examination, that Mr. Benitez was being chased by "three males, if not more."(AB,16-17;3/7/11,165) The State misunderstands the nature of rebuttal evidence and

erroneously implies that it can be used to bolster or attack its own evidence. As our supreme court stated in *People v. Welsh*:

> In order to present rebuttal evidence, the offering party necessarily must demonstrate that the evidence is relevant to rebut a specific claim, theory, witness *or other evidence of the adverse party. By its very nature, then, rebuttal evidence generally should be admitted after the adverse party has presented its evidence.*

People v. Welsh, 80 P.3d 296, 304 (Colo. 2003) (citing *People v. Trujillo*, 49 P.3d 316, 320 (Colo. 2002)) (emphasis added). To accept the State's position on appeal one must then accept the proposition that a prosecutor may use the defendant's silence against him as evidence at trial in order to "rebut" the State's own evidence.

Contrary to the State's arguments, the evidence and closing argument "expressly directed the jury to consider, as evidence of the defendant's guilt, his failure to protest his innocence *or offer an exculpatory statement.*" *People v. Ortega*, 597 P.2d 1034, 1037 (Colo. 1979) (emphasis added). The evidence therefore was used to create an inference of guilt and violated Mr. Benitez's privilege against self-incrimination.

The harm in this case was substantial. The evidence, as the State correctly observed, was used in the prosecution's closing argument. The State believes that the prosecution's inability to convict Mr. Benitez of prohibited use of a weapon, which logically would have required the jury to find guilt if it believed the prosecution's theory of events regarding menacing in this case, demonstrates that the evidence was

not harmful. (AB,18) However, the jury's inability to unanimously agree on this count, instead, shows that evidence of menacing in this case was not overwhelming because the two counts depended on the same evidence.

III. The district court erred by admitting irrelevant and unfairly prejudicial testimony that Mr. Benitez had 286 bullets in a partially opened box in the car as well as a .22 magnum bullet in his pocket, which could not be used in his rifle, and admission of this testimony and the box of ammunition constituted reversible error.

The State argues that the ammunition evidence was admissible to rebut defense counsel's opening statement that Mr. Benitez found the rifle under a bale of hay "in a lot of pieces." (3/7/11,42) Defense counsel is permitted during opening argument, however, to address evidence "it believes in good faith will be available and admissible." ABA Standards for Criminal Justice, The Defense Function, Standard 4-7.4 (3d ed. 1993). Here, the evidence that the rifle had previously been unassembled was, as in the preceding issue, elicited by the State from its own witness. (3/7/11,142-44) The ammunition testimony, therefore, cannot be admissible as rebuttal evidence when the prosecution introduced it. *People v. Welsh*, 80 P.3d 296, 304 (Colo. 2003) (citing *People v. Trujillo*, 49 P.3d 316, 320 (Colo. 2002)).

Mr. Benitez rests on his remaining arguments presented in the Opening Brief.

IV. Admission of evidence of prior incarcerations, silence following arrest, and possession of a substantial amount of ammunition in the car, taken together, require reversal for cumulative error.

Mr. Benitez rests on the arguments and authorities presented in the Opening Brief.

CONCLUSION

Based on the arguments and authorities presented above and in the Opening Brief, this Court should reverse.

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CERTIFICATE OF SERVICE

I certify that, on November 8, 2012, a copy of this Reply Brief of Defendant-Appellant was served on Patricia R. Van Horn, Senior Assistant Attorney General of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us: