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| On Certiorari to the Colorado Court of Appeals<br>Court of Appeals Case No. 05CA1480 | |
| THE PEOPLE OF THE STATE OF COLORADO,<br><br>Petitioner,<br><br>v.<br><br>FARRELL GREENLEE,<br><br>Respondent. | ▲ COURT USE ONLY ▲<br>Case No.: 08SC10 |
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**PEOPLE'S OPENING BRIEF**

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## TABLE OF CONTENTS

**PAGE**

ISSUES PRESENTED .......... 2

STATEMENT OF THE CASE .......... 2

STATEMENT OF FACTS .......... 3

ARGUMENT .......... 12

The trial court did not commit any error at all—let alone plain error—by allowing the prosecution to admit evidence that prior to his shooting of Ms. Stewart, Greenlee had spoken of a plan to kill and hide the body of a woman in a rural area .......... 12

A. The grounds on which the court of appeals reversed Greenlee's convictions .......... 12

B. The procedural history concerning the admission of Ms. Forristall's testimony .......... 13

C. The court of appeals erred in applying the harmless error standard of review to the admission of Ms. Forristall's testimony .......... 15

D. Ms. Forristall's evidence was admissible under simple relevancy principles, as res gestae evidence, or as other act evidence under CRE 404(b) .......... 18

1. Simple relevancy. .......... 19

2. Relevancy as gestae evidence .......... 21

3. Relevancy as other act evidence under CRE 404(b). .......... 24

CONCLUSION .......... 28

## TABLE OF AUTHORITIES

**PAGE**

**CASES**

California v. Green, 399 U.S. 149 (1970) .......... 25
Carrillo v. People, 974 P.2d 478 (Colo. 1999) .......... 19
Dunlap v. People, 173 P.3d 1054 (Colo. 2007) .......... 19
Hart v. Schwab, 990 P.2d 1131 (Colo. App. 1999) .......... 16
Huddleston v. United States, 485 U.S. 681 (1988) .......... 25
People v. Abeyta, 923 P.2d 318 (Colo. App. 1996) .......... 26
People v. Bernabei, 979 P.2d 26 (Colo. App. 1998) .......... 22
People v. Braley, 879 P.2d 410 (Colo. App. 1993) .......... 17
People v. Czemerynski, 786 P.2d 1100 (Colo. 1990) .......... 21, 22
People v. Fears, 962 P.2d 272 (Colo. App. 1997) .......... 22
People v. Garcia, 113 P.3d 775 (Colo. 2005) .......... 28
People v. Garner, 806 P.2d 366 (Colo. 1991) .......... 24, 25
People v. Gladney, 570 P.2d 231 (Colo. 1977) .......... 26
People v. Greenlee, No. 05CA1480 (Colo. App. Nov. 1, 2007) (not published pursuant to C.A.R. 35(f)) .......... 3, 12, 13, 15, 23
People v. Hampton, 746 P.2d 947 (Colo. 1987) .......... 17
People v. Ibarra, 849 P.2d 33 (Colo. 1993) .......... 19
People v. Kruse, 839 P.2d 1 (Colo. 1992) .......... 16
People v. Martinez, 36 P.3d 154 (Colo. App. 2001) .......... 25
People v. McGraw, 30 P.3d 835 (Colo. App. 2001) .......... 27
People v. Miller, 113 P.3d 743 (Colo. 2005) .......... 15, 17
People v. Miller, 890 P.2d 84 (Colo. 1995) .......... 25, 26
People v. Ned, 923 P.2d 271 (Colo. App. 1996) .......... 26
People v. Quintana, 882 P.2d 1366 (Colo. 1994) .......... 19, 21
People v. Rath, 44 P.3d 1033 (Colo. 2002) .......... 19, 23, 24

## TABLE OF AUTHORITIES

**PAGE**


People v. Rollins, 892 P.2d 866 (Colo. 1995) .................... 16, 21

People v. Sepulveda, 65 P.3d 1002 (Colo. 2003) .................... 17

People v. Shreck, 22 P.3d 68 (Colo. 2001) .................... 17

People v. Skufca, 176 P.3d 83 (Colo. 2008) .................... 21

People v. Warren, 55 P.3d 809 (Colo. App. 2002) .................... 27

People v. Watson, 668 P.2d 965 (Colo. 1992) .................... 16

People v. Winters, 765 P.2d 1010 (Colo. 1988) .................... 16

People v. Woertman, 804 P.2d 188 (Colo. 1991) .................... 21

People v. Young, 923 P.2d 145 (Colo. App. 1995) .................... 26

United States v. Frady, 456 U.S. 152 (1982) .................... 17


**RULES**


CRE 103(a)(1) .................... 16

CRE 104(b) .................... 26

CRE 402 .................... 19

Crim. P. 52(b) .................... 17


**OTHER AUTHORITIES**


2 Weinstein's Federal Evidence § 401.02[1] .................... 19

## ISSUES PRESENTED

Whether the court of appeals erred in holding that evidence of a defendant's plan to shoot a women and then hide her body made two months before he shoots a woman and hides her body is inadmissible as res gestae evidence at his murder trial.

Whether the court of appeals erred in not applying a plain error standard of review to the admission of the witness's testimony about defendant's plan.

Whether admitting evidence erroneously under a res gestae theory, when it might have been admissible under CRE 404(b), is reversible error.

## STATEMENT OF THE CASE

Farrell Greenlee shot Marcie Stewart—an ex-girlfriend—in the face with a shotgun. He stuffed her body into an old refrigerator and dumped both in a rural area. Greenlee claimed to have shot Ms. Stewart accidentally.

A Montezuma County jury convicted Greenlee of second degree murder, a crime of violence, and tampering with evidence (v. 4, pp. 763-64; v. 23, pp. 1193-94). The trial court sentenced him to forty-eight years in prison for second degree murder and eighteen months in prison for tampering with evidence, with the sentences to run concurrently (v. 24, p. 67).

On appeal, the court of appeals reversed on the ground that the trial court admitted, as res gestae evidence, evidence that prior to killing Ms. Stewart and

hiding her body, Greenlee had spoken of a plan to kill a woman and hide her body. People v. Greenlee, No. 05CA1480, slip op. at pp. 4-7 (Colo. App. Nov. 1, 2007) (not published pursuant to C.A.R. 35(f)) (copy attached). The court of appeals further held that harmless error was the standard of review and that the trial court's error in admitting the evidence was not harmless. Id. at pp. 7-10. The court of appeals further held that it could not find that the evidence was admissible as other act evidence under CRE 404(b) because it could not find as an appellate court, that by a preponderance of the evidence Greenlee had made the statement, and thus remanded the case to the trial court to make that finding. Id. at pp. 10-12.[1]

## STATEMENT OF FACTS

In December 2003, twenty-three-year-old Marcie Stewart had been dating Doug Murdock on and off for many years (v. 22, pp. 1034-35). On December 12, she was living with him in a rented house on Highway 160 in Cortez, Colorado (v. 22, pp. 1035, 1037).

[1] The court of appeal also rejected Greenlee's claim that the evidence had been insufficient to support his conviction. Slip op. at pp. 2-4. The court of appeals left resolved two other issues. Slip op. at p. 12.

At about 10 a.m. that morning, Farrell Greenlee and his girlfriend—Mari Wareham—came over to get high on methamphetamine (v. 22, pp. 814, 816, 820, 1039-40). Greenlee had dated Ms. Stewart at one time (v. 20, pp. 448, 493).

According to Murdock and Wareham, Greenlee was carrying the shotgun that he habitually carried (v. 21, pp. 747-48, 750; v. 22, pp. 1038, 1041, 1079). Murdock showed Greenlee and Wareham into his bedroom, where Ms. Stewart was sitting on the bed, and Murdock and Greenlee pooled the methamphetamine that they had and injected it (v. 22, p. 1042).[2] Soon after that, Murdock left the room to get more cigarettes from his truck, which was parked outside (v. 22, pp. 1043-44).

Wareham testified at trial that Greenlee started to follow Murdock, but Ms. Stewart stopped him by asking to see his gun (v. 21, pp. 761-62, 768; v. 22, p. 825). Greenlee argued with her, telling her, "No," but bringing the gun up from its vertical position to a horizontal one (v. 21, pp. 768, 773; v. 22, p. 827). Wareham heard a noise that might have been the gun being cocked (v. 22, pp. 809, 829). Ms. Stewart said that she wanted it, but not in her face (v. 21, p. 789; v. 22, pp. 834-35). According to Wareham, this was in a joking, friendly manner (v. 22, p. 828).

[2] Wareham testified that nobody had any methamphetamine, so they did not get high together (v. 22, p. 820).

After about one minute of this banter, Wareham leaned over the bed to retrieve some cigarettes from her purse (v. 21, p. 774). Just before her head went down, she saw Ms. Stewart's arm go up toward Greenlee's gun (v. 21, pp. 775-76, 778-79). Her hand came about two feet from the gun (v. 21, p. 779). When Wareham's head was pointed down toward the floor, she heard the gun fire (v. 21, pp. 780, 796; v. 22, p. 835). Ms. Stewart had been shot in the mouth (v. 21, p. 781).

According to Wareham, Greenlee was shocked; he stated, "Oh, my God," and turned white as a sheet (v. 22, pp. 836-37). Greenlee was concerned that Wareham was okay, since she had been splattered with Ms. Stewart's blood (v. 21, p. 783; v. 22, p. 836). Wareham said that she was fine and asked what had happened (v. 21, p. 783). Greenlee replied, "You know what happened," and that they had to tell Murdock (v. 21, pp. 783-84; v. 22, p. 838).

Outside the house, Greenlee told Murdock that there had been an accident (v. 21, p. 784; v. 22, pp. 839, 1047). According to Murdock, Greenlee was calm and collected (v. 22, p. 1047). He led Murdock up to the bedroom (v. 21, p. 784).

According to Wareham, Greenlee asked, "What are we going to do? What are we going to tell them? We've got to call someone" (v. 21, p. 786). Also according to Wareham, Murdock repeated several times that nobody was going to

leave and nobody was going to call the police (v. 21, pp. 786-87, 792-93; v. 22, p. 840). He was concerned because he was a felon who was not supposed to have guns in the house or to be in the presence of guns (v. 22, pp. 840, 842).

Murdock testified that he was upset and scared and asked Greenlee, "What the f___ is wrong with you?" Greenlee replied that it had been accident, but that he had cocked the gun because that is what you do with a loaded gun (v. 21, p. 800; v. 22, p. 1049). Murdock concluded that it had not been an accident, and he was afraid of being shot, too (v. 22, p. 1050). Greenlee was pointing the gun at him and telling him that he needed to be quiet, or "I'll send you screaming out the other side like" Ms. Stewart (v. 22, p. 1052).

Greenlee instructed Murdock to open his garage door, then backed his car into the garage and loaded Ms. Stewart's body, wrapped in blankets, into the trunk (v. 22, pp. 1053-54). He helped Murdock load the mattress on which Ms. Stewart had been shot into the bed of Murdock's pickup truck (v. 22, pp. 1053, 1055). Greenlee then led Murdock down the canal road to a place on his father's rural property next to an old camper, where they unloaded the mattress (v. 22, pp. 1056-60). He told Murdock not to say anything about what had happened to Ms. Stewart, but that if anyone asked, to tell them that Ms. Stewart had left with someone in a red Chevrolet pickup truck (v. 22, p. 1060).

Wareham never did call the police or an ambulance (v. 21, p. 792). She testified that this was because she was scared that: (1) the police would not understand what had happened; (2) Murdock would hurt her; and (3) Wareham could have been the one who was shot, since she was sitting so close to Ms. Stewart (v. 21, p. 792). Murdock said that he never called police because he was afraid of Greenlee (v. 22, pp. 1060-61).

On December 17, 2003, police executed a search warrant at Murdock's home for drugs (v. 20, pp. 455, 511, 525; v. 22, p. 876). By that time, the mattress was gone (v. 20, p. 457). Police found a 12-gauge shotgun at the house (v. 20, p. 547; v. 22, p. 877). Murdock had been holding it before the raid (v. 20, pp. 511-12, 519). The police did not yet know anything about Ms. Stewart's shooting (v. 20, p. 526).

Ms. Stewart's mother reported her missing on January 6, 2004 (v. 20, p. 446).

On February 7, 2004, police searched Greenlee's car (v. 20, p. 528). There were shotgun shells on the floor, mostly 12-gauge, and blood stains containing Ms. Stewart's DNA on a box in the trunk, a foil blanket in the trunk, and the trunk liner itself (v. 20, pp. 528-31, 533, 536; v. 21, pp. 657, 707; v. 22, p. 1117).

On February 10, 2004, Murdock met with police (v. 22, pp. 913-14, 1062, 1069). At first, he told them that he knew nothing about Ms. Stewart's disappearance (v. 22, pp. 914, 1063, 1069). Later, he told them that Greenlee told him that it was an accident (v. 22, pp. 914, 1075). Still later, Murdoch told the police that he had not been present, but that from what he saw, it had not been an accident (v. 22, pp. 919-20, 1075, 1105).

On February 13, 2004, Greenlee's father, Gale Greenlee ("Mr. Greenlee"), told police that his son had been burning something near an old camper on his property in the first part of December 2003 (v. 21, pp. 631-32). When Mr. Greenlee asked his son what he was burning, Greenlee replied that he was burning some old mattresses (v. 21, p. 632). Police later observed melted bed springs and cans of flammable liquid at the site (v. 21, p. 634; v. 22, p. 873).

Greenlee and Wareham were arrested a few days later at Tammy Witt's trailer home (v. 20, pp. 539-40; v. 22, p 932). In the room where Greenlee had been staying was a sawed-off shotgun (v. 20, p. 539; v. 22, p. 878).

On February 29, 2004, Mr. Greenlee received a letter from his son (v. 21, p. 577). Greenlee said something in the letter about taking care of the cat named Thistles (v. 21, p. 581). Greenlee had never had a cat named Thistles, but he did at one time own a horse named Thistles, which had died and was buried on the edge

of a canyon on his property where Greenlee often disposed of dead animals (v. 21, pp. 581-82). Mr. Greenlee thought that his son was trying to tell him something and went out to the canyon (v. 21, pp. 582, 587). Mr. Greenlee found Ms. Stewart's body wrapped in blankets and stuck in an old refrigerator near that site (v. 21, pp. 589, 592).[3] He immediately telephoned police (v. 21, p. 592).

Wareham later told the prosecution that if Ms. Stewart was killed intentionally, it might have been because she was a snitch: "You don't snitch and you don't rip people off" (v. 22, pp. 810-11). However, Wareham did not know before the shooting that Ms. Stewart had informed the police about Murdock's methamphetamine manufacturing activities or that Ms. Stewart had stolen anything (v. 22, p. 812).[4] As far as she and Murdock knew, Greenlee did not know either about Ms. Stewart's status as a police informant (v. 22, pp. 813, 1107). Greenlee told Wareham a couple of weeks after the shooting, "I think I may have popped a snitch" (v. 22, pp. 842-44, 864).

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[3] Mr. Greenlee also claimed to have found a wreath lying near the refrigerator, but he never told police about it; police who came to the scene never saw a wreath, and it appeared in none of the police photographs of the scene (v. 21, pp. 591-92, 608-09, 622, 669, 675, 689; v. 22, p. 871).

[4] Wareham did testify that at one point in their conversation before the shooting, Ms. Stewart said something about having Greenlee's property and meaning to return it, but not having it with her (v. 21, pp. 760-61).

In May 2004, Greenlee wrote a letter to his friend Lisa Walker (v. 21, pp. 728-29, 733). It read in relevant part:

> Have you read any good books lately? Obviously, I've read quite a few books lately. "A Simple Plan" was one of them that really hit home for me because I love it when a plan comes together, which is, of course, how I got in this mess anyway. It's a shame that I can't tell you all about it, but one day we will sit down and I'll tell you one hell of a story.

(v. 21, p. 734). The novel "A Simple Plan" is about two people who find money in a crashed airplane and murder several people to keep the secret. The murderer in the novel was never caught (v. 22, pp. 946-48).

On January 13, 2005, Murdock was incarcerated at the Montezuma County Jail (v. 22, pp. 1064-65). Greenlee walked by his cell that day and mouthed to Murdock that Murdock was not going to make it to testify; he also drew his finger across his throat in a cutting motion (v. 22, p. 1067).[5]

Forensic evidence showed that Ms. Stewart was shot with a shotgun from a distance of two to eight feet directly in front of her face (v. 21, p. 703; v. 22, pp. 900, 975, 977, 998, 1004).

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[5] A detention officer who was running the control room that day saw Greenlee stop in front of Murdock's cell and glare inside, but did not see Greenlee move his mouth or hands (v. 22, pp. 1113-14).

Calinda Forristall testified that in October 2003, she and some friends, including Greenlee, were using methamphetamine together (v. 22, pp. 1020-21). Greenlee remarked that if they could get a woman from "the Mesa" to a place on Charles and Byron Fish's farm, they could shoot her and hide the body and nobody would ever know that it had happened (v. 22, pp. 1021, 1023). Ms. Forristall testified that Greenlee was doing most of the talking, there were maps present, and Greenlee had with him his shotgun that he carried habitually (see v. 22, pp. 1022-23).

Greenlee argued that he shot Ms. Stewart accidentally and he was thus only guilty of criminally negligent homicide. Greenlee argued that he was not guilty of tampering with evidence because when he hid Ms. Stewart's body there was no investigation he could have been hindering; instead, he argued he was only guilty of concealing a death (see v. 23, pp. 1164-85).

## ARGUMENT

**The trial court did not commit any error at all—let alone plain error—by allowing the prosecution to admit evidence that prior to his shooting of Ms. Stewart, Greenlee had spoken of a plan to kill and hide the body of a woman in a rural area.**

This case provides this court with an opportunity to delineate the differences between evidence that is admissible under simple principles of relevant, because it relevant as res gestae evidence, or because it relevant as other act evidence under CRE 404(b).

This case concerns the court of appeals' reversal of a murder conviction based on erroneous determinations of the standard of review, what is needed to admit testimony as res gestae evidence, and how appellate courts can determine, for the first time on appeal, that evidence was admissible pursuant to CRE 404(b).

### A. The grounds on which the court of appeals reversed Greenlee's convictions.

In its opinion, the court of appeals held that the trial court erred in admitting as res gestae evidence Ms. Forristall's testimony that, two month prior to Greenlee killing Ms. Stewart and hiding her body on rural property, Greenlee had spoken of a plan to murder a woman and dispose of her body on rural property. Greenlee, slip op. at pp. 4-7. The court of appeals further held that harmless error constituted

the standard of review and there was a reasonable possibility that the error in admitting the evidence contributed to Greenlee's conviction. Id. at pp. 7-10. Further, the court of appeals held that the admission of the evidence could not be admitted as other act evidence pursuant to CRE 404(b) because the trial court had failed to comply with the procedural safeguards for admitting such evidence. Id. at pp. 10-12.

### B. The procedural history concerning the admission of Ms. Forristall's testimony.

Pretrial, the prosecution moved pursuant to CRE 404(b) to admit the testimony of Ms. Forristall concerning Greenlee's discussion of his plan to murder a woman and dispose of her body on rural property (v. 2, pp. 472-74).

The trial court addressed the prosecution's motion at a pretrial hearing (v. 13, pp. 8-14) (copy attached). The trial court stated it did not know why the prosecution was trying to admit Ms. Forristall's evidence under CRE 404(b) because it was of "the same transaction" since there was no evidence that Greenlee had been involved in the murder of anyone other than Ms. Stewart, and thus, the evidence "just comes in" (see v. 13, pp. 8-9, 13). The prosecution said it thought CRE 404(b) was the proper procedural means for admitting the evidence because,

according to Ms. Forristall, Greenlee had not stated that Ms. Stewart was the target of this plan (see v. 13, pp. 8-9).

Defense counsel appeared to agree with the prosecution's analysis that CRE 404(b) provided the means for determining whether Ms. Forristall's evidence was admissible (see v. 13, pp. 9-10). Defense counsel then opposed the admission of Ms. Forristall's testimony under CRE 404(b) because other people present at the time Greenlee allegedly discussed this plan would dispute her testimony (v. 13, pp. 10-11). Thus, defense counsel argued that the trial court should not admit Ms. Forristall's testimony "without an evidentiary hearing in advance to determine whether or not it's evidence that is reliable enough to go before a jury . . . ." (v. 13, pp. 10-12). The trial court indicted that it did not know how it could rule evidence inadmissible from one witness merely because it was disputed by other witnesses (see v. 13, p. 12, ll. 9-12).

The following then occurred:

> [DEFENSE COUNSEL]: The Court's basically now saying that the Court doesn't view it as a 404(b) issue.
>
> THE COURT: If you would like some time to think about it and if you want to file a motion in limine, I'll let you do that.
>
> [DEFENSE COUNSEL]: Okay. That's what I would ask the Court to do. I mean, if the Court doesn't want to

> hear evidence concerning this, the Court's inclined to believe that it's not a 404(b) issue. I would prefer to have the Court reserve final ruling regarding whether on not there should be a pretrial hearing on this until I have an opportunity to take a look at the grounds on which the Court is saying that it believes it's admissible.
>
> THE COURT: That's fine, I don't have a problem with that. That's fine.

(v. 13, pp. 13-14).

The People have examined the record and been unable to find anywhere where defense counsel later raised the issue of the admissibility of Ms. Forristall's testimony on any ground. Defense counsel did not object to her testimony on any ground at the time she gave it (see v. 22, pp. 1018-30).

**C. The court of appeals erred in applying the harmless error standard of review to the admission of Ms. Forristall's testimony.**

In its opinion, the court of appeals applied the harmless error standard of review. See Greenlee, slip op. at pp. 4 ("Over defendant's objection . . . ."), 8 (setting forth the harmless error standard of review). That does not appear to be correct.

Whether the court of appeals applied the correct appellate standard of review is a question of law that is reviewed de novo. See People v. Miller, 113 P.3d 743, 748-50 (Colo. 2005).

It is well-established that to preserve an issue for appellate review, a party must make a timely and specific objection at trial. See CRE 103(a)(1); People v. Rollins, 892 P.2d 866, 874 n. 13 (Colo. 1995); People v. Kruse, 839 P.2d 1, 3 (Colo. 1992); People v. Winters, 765 P.2d 1010, 1014 (Colo. 1988).

A timely and proper objection alerts the trial court of the precise nature of the alleged evidentiary error, thus "enabl[ing] the trial court to rule intelligently on the objection and affords opposing counsel an opportunity to propose alternatives that address the concerns underlying the objection." Hart v. Schwab, 990 P.2d 1131, 1135 (Colo. App. 1999).

In the absence of such an objection, a claim that evidence was improperly admitted will be reviewed for plain error, if it is reviewed at all. CRE 103(a)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context"); see People v. Watson, 668 P.2d 965, 967 (Colo. 1992) (having failed to object in the trial court on the grounds asserted on appeal, the defendant is deemed to have waived the objection); Kruse, 839 P.2d at 3 (a party fails to preserve an evidentiary issue for appeal not only by failing to make a specific objection but also by making the wrong specific objection); People

v. Hampton, 746 P.2d 947, 953 n.11 (Colo. 1987), abrogated on other grounds, People v. Shreck, 22 P.3d 68 (Colo. 2001); People v. Braley, 879 P.2d 410, 415 (Colo. App. 1993) (plain error standard of review applied to evidence objected to at trial on other grounds).

Crim. P. 52(b) allows appellate courts to address "[p]lain errors or defects affecting substantial rights." However, before an error can constitute plain error, it must have been "obvious and substantial" at the time it was made, and to have "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." Miller, 113 P.3d at 750 (quoting People v. Sepulveda, 65 P.3d 1002, 1006 (Colo. 2003)); see United States v. Frady, 456 U.S. 152, 163 (1982) (plain error is shown only in the case of "a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it").

Here, the prosecution sought to admit Ms. Forristall's evidence pursuant to CRE 404(b), and Greenlee objected on the basis that he had witnesses who would dispute it. The trial court did not rule on the prosecution's CRE 404(b) motion, and instead indicated that the evidence was admissible under general relevancy principles. As to defense counsel, he sought and was given leave to file a motion in limine concerning holding a hearing on the admissibility of Ms. Greenlee's

testimony. It does not appear that defense counsel ever did that, and defense counsel made no objection to Ms. Forristall's testimony on relevancy, CRE 404(b), or any other ground. It thus appears defense counsel abandoned any objection he had to Ms. Forristall's testimony, and thus no contemporary objection was made to it. The court of appeals, therefore, erred in applying the harmless error standard for reviewing the admission of Ms. Forristall's testimony.

### D. Ms. Forristall's evidence was admissible under simple relevancy principles, as res gestae evidence, or as other act evidence under CRE 404(b).

The trial court appeared to find Ms. Forristall's testimony admissible under plain principles of relevancy. Depending on how it is interpreted, it admissible as res gestae evidence or other act evidence under CRE 404(b).

At trial, the prosecution argued that Ms. Forristall's testimony about Greenlee's plan to murder a woman was related to the letter Greenlee wrote about the murder plan in the book "A Simple Plan" and demonstrated that he acted in accordance with that plan when he shot Ms. Stewart and disposed of her body (see v. 23, pp. 1145-47, 1159-60, 1186, 1190)

### 1. Simple relevancy.

The Colorado Rules of Evidence strongly favor the admission of material evidence, and a trial court has substantial discretion in deciding questions concerning the admissibility of evidence. People v. Quintana, 882 P.2d 1366, 1371 (Colo. 1994); People v. Ibarra, 849 P.2d 33 (Colo. 1993). The trial court abuses its discretion only when it makes a ruling is manifestly arbitrary, unreasonable, or unfair. Dunlap v. People, 173 P.3d 1054, 1094 (Colo. 2007). Abuse of discretion is an extremely deferential standard of review. See Carrillo v. People, 974 P.2d 478, 485-86 (Colo. 1999) (holding that the terms "abuse of discretion," "clear abuse of discretion," and "gross abuse of discretion" are synonymous).

Under CRE 401, relevant evidence as any "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." Facts that logically tend to prove or disprove the fact at issue or which afford a reasonable inference or shed light on the matter contested are relevant. People v. Rath, 44 P.3d 1033, 1038 (Colo. 2002). Unless otherwise provided by constitution, statute, or rule, all relevant evidence is admissible. CRE 402.

Relevance "is more a concept than a definition." 2 Weinstein's Federal Evidence § 401.02[1]. "[A]n item of proof is relevant if it tends to prove or

disprove any material issue of fact in the case." Id. "Evidence need not prove conclusively the proposition for which it is offered, nor make that proposition appear more probable than not, but it must in some degree advance the inquiry." Weinstein, § 401.04[2][b]. Under CRE 401, evidence is relevant if it has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." (emphasis added).

Here, it was undisputed that Greenlee shot Ms. Stewart in the face from close range with a shotgun and then disposed of her body in a rural area. The primary question the jury had to decide, therefore, was Greenlee's mental state when he did so. The prosecution's evidence that Greenlee had spoken of a plan to kill a woman two months before he killed Ms. Stewart and to dispose of her body in the manner in which he disposed of Ms. Stewart's body was evidence that was relevant to his mental state. Of course, when a person commits acts that are similar to acts he set forth in a plan of action, is not illogical to conclude that the person executed the plan. Furthermore, such evidence takes on greater import when coupled with Greenlee's references in his letter to a literary murder plan "com[ing] together" and leading up to "how I got in this mess anyway" (v. 21, p. 734). Ms. Forristall's evidence was thus admissible under simple relevancy principles, and the trial court did not abuse its discretion in admitting it as such.

### 2. Relevancy as gestae evidence.

A sub-grouping of relevant evidence is res gestae evidence. "Criminal occurrences do not always take place on a sterile stage . . . ." People v. Czemerynski, 786 P.2d 1100, 1109 (Colo. 1990). Consequently, trial courts may admit evidence of the res gestae of a crime, that is, "the events leading up to the crime [that] are a part of the scenario [and] which explain[] the setting in which [the crime] occurred . . . ." Id.

Res gestae evidence is generally linked in time and circumstances with the charged crime, helps explain what occurred, or is necessary to give the jury a full and complete understanding of the events surrounding a crime. See People v. Skufca, 176 P.3d 83, 86 (Colo. 2008); People v. Rollins, 892 P.2d 866, 872-73 (Colo. 1995); People v. Quintana, 882 P.2d 1366, 1373 (Colo. 1994).

Res gestae evidence also includes "[m]atters incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be properly understood." People v. Woertman, 804 P.2d 188, 190 n.3 (Colo. 1991).

Ms. Forristall testified that Greenlee did not refer to a particular person as the target of his plan (see v. 22, pp. 1021, 1028). Thus, the evidence could be

interpreted as not relating to Ms. Stewart specifically when Greenlee spoke of his plan. As such, the evidence would be admissible to explain the setting in which Ms. Stewart's murder occurred, that of Greenlee being fascinated by committing and getting away with murdering a woman. It also helped explain Greenlee's references to the book "A Simple Plan" and his statement in the letter to a plan "com[ing] together."

The court of appeals held that Ms. Forristall's testimony could not constitute res gestae evidence because it referred to statements remote in time to Ms. Stewart's murder. See slip op. at 7. Res gestae evidence occurs "contemporaneously with **or is part and parcel of the crime charged** . . . ." Czemerynski, 786 P.2d at 1109 (emphasis added); see People v. Bernabei, 979 P.2d 26, 30 (Colo. App. 1998) (noting that res gestae rulings have "permitted the admission of evidence of other transactions relating back over a period of weeks"); People v. Fears, 962 P.2d 272, 280 (Colo. App. 1997) (in witness execution case, evidence of the crime the victims witnessed six months before the executions was admissible as res gestae evidence). The two months between Greenlee's statement of his plan in front of Ms. Forristall and his killing of Ms. Stewart did not demonstrate that the plan no longer had any relevance; rather, the gap served to

increase its relevance because it demonstrated a long-standing interest on Greenlee's part to commit a murder in the manner he did.

The court of appeals also held that the plan could not constitute res gestae evidence because "there are numerous inconsistencies between the alleged 'plan' and the undisputed events which occurred . . . ." Greenlee, slip op. at pp. 6-7. The court of appeals cites no authority in support of this proposition of law, and the People have been unable to find any. It appears to be an importation of now-defunct belief that the admission of other act evidence under CRE 404(b) required a high degree of similarity. See Rath, 44 P.3d at 1041-42 ("Contrary to the apparent assumption of the court of appeals, however, CRE 404(b) contains no separate requirement of similarity."). There should not be any similarity requirement either since plans are notoriously deficient to execute unchanged, as in the sayings, "No plan survives first contact with the enemy" and "The best laid plans of mice and men often go awry."

Consequently, Ms. Forristall's testimony was also admissible as res gestae evidence.

### 3. Relevancy as other act evidence under CRE 404(b).

The court of appeals held that it could not find Ms. Forristall's testimony admissible as other act evidence under CRE 404(b) "because the trial court did not comply with CRE 404(b)'s procedural safeguards, [and thus] the record lacks the necessary fact findings for us to conclude that the evidence is admissible." Greenlee, slip op. at 11.

Under CRE 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. But such evidence may be admissible for other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. CRE 404(b). In all cases, before admitting evidence of other crimes or bad acts, the trial court should determine that: (1) the proffered evidence is logically relevant to a material fact; (2) the logical relevance is independent of the intermediate inference that the defendant has a bad character; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Rath, 44 P.3d at 1038. Before any other-act evidence is admissible, the court must find by a preponderance of the evidence that the other act occurred and that the defendant committed it. People v. Garner, 806 P.2d 366,

370-72 & n. 4 (Colo. 1991).[6] In addition, trial courts should give limiting instructions concerning other act evidence at the time it is admitted and in the final jury instructions. People v. Miller, 890 P.2d 84, 97 (Colo. 1995).

Appellate courts can and do make for the first time on appeal the findings necessary to admit other act evidence. This court has done it in Miller, 890 P.2d at 96-98, and the court of appeals has done it in People v. Martinez, 36 P.3d 154, 158-60 (Colo. App. 2001). In this particular case, this court can apply the test for admitting evidence under CRE 404(b) for the first time on appeal and find it admissible for the following reasons: (1) the evidence was offered for the proper purpose of proving that Greenlee's shooting of Ms. Stewart and the disposal of her body were not accidental; (2) it was relevant to proving that purpose because it demonstrated that he had acted to an established plan and not the result of panic-

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6 In Garner, 806 P.2d at 370-72 & n. 4, this court rejected the Supreme Court's holding in Huddleston v. United States, 485 U.S. 681, 687-89 (1988), that trial courts need not make preponderance of the evidence findings concerning whether a defendant committed the other act. In Huddleston, 485 U.S. at 687-89, the Supreme Court held that preponderance of the evidence findings on disputed fact issues—as opposed to legal admissibility issues—"superimpose[] a level of judicial oversight" that is unwarranted. The People suggest that, at least in cases such as this one, the better practice would be to allow the fact finder, using the normal trial means for testing the veracity of evidence, to make its own determination whether the defendant committed the prior act or made the statement in question. E.g. California v. Green, 399 U.S. 149, 158 (1970) ("cross-examination [is] the greatest legal engine ever invented for the discovery of truth").

driven extemporalizing; (3) that relevancy was independent of an intermediate inference of bad character; and (4) the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice.

While the trial court did not offer to give a limiting instruction as in Miller, 890 P.2d at 98, trial courts are not required to give them sua sponte. See People v. Gladney, 570 P.2d 231, 234 (Colo. 1977) ; People v. Ned, 923 P.2d 271, 276 (Colo. App. 1996).

As to the Garner preponderance of the evidence finding, as set forth above, the reason no such finding was made was because defense counsel chose not to ask the trial court to make one (see v. 13, pp. 13-14). The court of appeals, therefore, should not have reversed the trial court for not making a finding that counsel did not ask it to make. See People v. Abeyta, 923 P.2d 318, 321 (Colo. App. 1996) (a party abandons an issue when he or she fails to have it considered by the trial court); People v. Young, 923 P.2d 145, 149 (Colo. App. 1995) ("because he failed to request a ruling on this issue [from the trial court], defendant has waived it on appeal").

Furthermore, the trial court's admission of Ms. Forristall's testimony constitutes an implied finding by a preponderance of the evidence that Greenlee in fact made the statement attributed to him. See CRE 104(b) ("When the relevancy

of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."); People v. Warren, 55 P.3d 809, 814 (Colo. App. 2002) (in admitting the evidence under CRE 404(b), trial court implicitly determined it was satisfied that, by a preponderance of the evidence, the prior act occurred); People v. McGraw, 30 P.3d 835, 838 (Colo. App. 2001) (same).

Moreover, the only testimony in the record in opposition to Ms. Forristall's testimony was from a friend of Greenlee who stated that he did not "remember" there being a discussion of shooting a woman in Ms. Forristall's "presence" and believed it "hogwash" (v. 20. pp. 495-96). Based on that record, the trial court could have only found that the prosecution met its burden by a preponderance of the evidence.

At most, even if the trial court's implicit finding was insufficient to support the admission of this testimony under CRE 404(b), the case should be remanded for a more explicit preponderance of the evidence finding. If the trial court determines that the People established by a preponderance of the evidence that defendant made the statement at issue, the case should be affirmed. If not, then the case should be retried. It is inefficient and unnecessary to automatically grant

defendant a new trial when the resolution of this factual issue may very well render a new trial redundant. See People v. Garcia, 113 P.3d 775, 785 (Colo. 2005) (remanding case to supplement the record regarding defendant's involuntary intoxication defense, and directing that the conviction be affirmed if procedure revealed that defendant was not entitled to raise the defense).

## CONCLUSION

For these reasons, this court should reverse the court of appeals' opinion and remand the matter to that court so it can address the unresolved issues.


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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PEOPLE'S OPENING BRIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 21st day of July, 2008, addressed as follows:

Danyel Joffe
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1776 S. Jackson St, Ste. 602
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COLORADO COURT OF APPEALS

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Court of Appeals No.: 05CA1480
Montezuma County District Court No. 04CR44
Honorable Jeffrey R. Wilson, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Farrell Greenlee,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by: JUDGE ROY
Furman and Bernard, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced: November 1, 2007

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John W. Suthers, Attorney General, Cheryl Hone Canaday, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

The Joffe Law Firm, Douglas S. Joffe, Antony M. Noble, Denver, Colorado, for Defendant-Appellant

OPINION is modified as follows:

**Page 4, line 6 currently reads:**

testimony concerning a conversation some four months prior to the

**Opinion is modified to read:**

testimony concerning a conversation some two months prior to the

Defendant, Farrell Greenlee, appeals the judgment of conviction entered upon a jury verdict finding him guilty of second degree murder, tampering with evidence, and use of a deadly weapon. We reverse and remand for a new trial.

On December 12, 2003, defendant shot and killed a woman (the victim) with a shotgun. According to a witness present in the room at the time of the incident, defendant was leaving the room when the victim called to him and asked to see a shotgun he was carrying. Defendant turned toward the victim, pointing his gun at her. During this time, defendant and the victim were engaged in a playful banter. When the witness bent down to get cigarettes and looked away, she heard a "click" sound after which the shotgun discharged, striking the victim in the face at close range and killing her instantly.

There was no dispute that defendant was holding the shotgun at the time it discharged, or that he disposed of, or was involved in disposing of, the body in an abandoned refrigerator on his father's property not far from his personal residence located on the same property. The only issue at trial was his culpable mental state.

The prosecution argued that it was an intentional murder, and defendant argued that it was accidental. There was evidence, and permissible inferences from the evidence, to support both conclusions. The jury found defendant guilty of second degree murder, section 18-3-103, C.R.S. 2007; tampering with physical evidence, section 18-8-610(1)(a), C.R.S. 2007; and use of a deadly weapon, sections 18-1.3-406(2)(a)(I)(A), (7)(a), C.R.S. 2007. Defendant was sentenced to the Department of Corrections for forty-eight years.

This appeal followed.

I.

Defendant asserts that the prosecution presented insufficient evidence that he acted intentionally, which is required to support a conviction of second degree murder, and that the court should have granted his motion for acquittal under Crim. P. 29. We review this ruling de novo, *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005), and disagree.

The Due Process Clauses of the United States and Colorado Constitutions prohibit the criminal conviction of any defendant except on proof of guilt beyond a reasonable doubt. *Kogan v.*

*People*, 756 P.2d 945, 950 (Colo. 1988). When determining whether the evidence is sufficient to support a verdict, we follow these established rules: (1) the evidence, with reasonable inferences therefrom, must be viewed in the light most favorable to the jury's verdict; (2) the jury is assumed to have adopted that evidence which supports its verdict; and (3) we will neither weigh the evidence nor appraise the credibility of witnesses. *People v. Medina*, 185 Colo. 183, 185, 522 P.2d 1233, 1234 (1974); *Dodge v. People*, 168 Colo. 531, 535, 452 P.2d 759, 761 (1969).

Here, the prosecution presented evidence from which the jury could reasonably conclude that defendant acted intentionally. Specifically, the jury heard testimony that (1) there was a "click" before the shooting, which could indicate that defendant cocked the gun before firing it; (2) defendant's demeanor following the shooting included his statement to a friend that "[y]ou know what happened"; (3) defendant threatened the friend; (4) defendant immediately decided to hide the body; (5) defendant wrote a letter to a friend about how he enjoyed the novel *A Simple Plan*, which dealt with murder, and stated in the letter that his "plan" had "come together," which could suggest that he intended to get away with

murder; and (6) defendant disposed of the body. Given this evidence, we conclude that there was sufficient, albeit not overwhelming, evidence that he acted intentionally.

II.

Defendant asserts that the trial court erred in admitting testimony concerning a conversation some two months prior to the incident as res gestae evidence. We agree.

Over defendant's objection, the trial court allowed an acquaintance of defendant to testify concerning a conversation involving five or six persons, including the acquaintance and defendant, in which defendant said:

> [I]f they could get a woman to the rush place, which is on [a friend's farm], from the Mesa, that they could shoot her and nobody would know and they would be able to hide the body and nobody would even know that it had happened.

At the time of the conversation the participants were "hanging out" at a residence and under the moderate influence of methamphetamine.

Later in the trial, another witness for the prosecution, who had been present during the conversation, testified that he did not

remember this conversation and that he believed that the story was "hogwash." His explanation of the story was that it was "tweaker drama," which was a side effect of the methamphetamine.

Trial courts are accorded considerable discretion in deciding questions concerning the admissibility of evidence. *People v. Huckleberry*, 768 P.2d 1235, 1242 (Colo. 1989). Absent an abuse of discretion, a trial court's evidentiary rulings will be affirmed. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). To constitute an abuse of discretion, the trial court's evidentiary ruling must be shown to be manifestly arbitrary, unreasonable, or unfair. *People v. Martinez*, 83 P.3d 1174, 1179 (Colo. App. 2003).

For res gestae evidence to be admissible, it must be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v. Rollins*, 892 P.2d 866, 872-73 (Colo. 1995).

Res gestae evidence relates to a "matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be properly understood." *Woertman v. People*, 804 P.2d 188,

190 n.3 (Colo. 1991) (quoting *Martinez v. People*, 55 Colo. 51, 53-54, 132 P. 64, 65 (1913)). The evidence is properly admitted if it is "linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *People v. Quintana*, 882 P.2d 1366, 1373 (Colo. 1994) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Here, there are numerous inconsistencies between the alleged "plan" and the undisputed events which occurred.

1. The "plan" involved luring a woman to an identified remote location. Here the victim and defendant were guests at the residence of a mutual friend, and the victim initiated the conversation concerning the gun.
2. The "plan" involved nobody knowing about the body. Here, there was one witness in the room at the time of the shooting and another witness outside who was immediately advised.
3. The "plan" involved hiding the body at a remote location on a friend's farm. Here, the victim's body was hidden on defendant's father's farm near defendant's residence.

4. There was no indication that the "plan" involved this victim. Indeed the "plan" is consistent with the victim being a stranger, and here the victim was a friend.

Further, the conversation during which the "plan" was mentioned was remote in time. *Cf. Callis v. People*, 692 P.2d 1045, 1051 n.9 (Colo. 1984) ("Evidence of criminal conduct that occurs contemporaneously with or is part and parcel of the crime charged is considered part of the res gestae. . . ."). And none of the persons present when the "plan" was mentioned were present at the actual incident. The only similarities between the "plan" and the actual incident are that a woman was killed and the body was hidden.

Given the remoteness in time and lack of similarity between the "plan" and the incident, the evidence was not admissible as res gestae evidence. Defendant's statement about the "plan," remote in time and vague in nature, was neither incidental to the shooting, nor explanatory of it. Thus, testimony about the plan was not "so closely connected" with the events at the time of the shooting "as to constitute a part of the transaction." *Woertman*, 804 P.2d at 190 n.3. Nor can we conclude its admission was harmless.

The proper inquiry in determining whether an error is harmless is whether it substantially influenced the verdict or affected the fairness of the trial proceedings. If a reviewing court can say with fair assurance that, in light of the entire record of the trial, the error did not substantially influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless. Crim. P. 52(a); *People v. Novitskiy*, 81 P.3d 1070, 1072 (Colo. App. 2003) (citing *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989)).

Here, as previously discussed, there was limited evidence that defendant had the requisite culpable mental state required for second degree murder. While the testimony was brief and might have had little consequence, the prosecution relied heavily on the fact that defendant had a "plan" to murder someone. The prosecution's closing argument began as follows:

> [The People]: You have heard undisputed evidence that in October of 2003 the defendant planned to kill - -
>
> [Defendant objected to the characterization of the evidence as undisputed and the court overruled the objection.]

> [The People]: You heard the evidence of [a witness] that in October, she was in [a friend's] house and that she heard this defendant with his trench coat on, with his gun, that 20 gauge, talk about killing a woman and putting her where nobody would find her. What did [the witness] have to gain by getting up there and telling you what she heard. Did she have some kind of deal? No. Did she have anything to gain? Did she have any interest[ ] in the outcome? Remember all those credibility factors that you look at. She's a young mother with a baby and she had the courage to come up there and tell you what she heard.
>
> So the defendant has been planning this murder since October of 2003. And he's in no hurry. He's waiting for his opportunity. That's part of his plan.

Then in the rebuttal argument, the prosecution stated:

> [The witness] said she was moderately under the influence. She admitted she did meth, but she was straight as an arrow, she gave you specific detailed information about what was said. [Defendant] specifically said in this particular location, we can shoot and kill a woman and we can hide the body where nobody will see her, period. Nobody else had the courage to come forward because in the tweaker world, you don't snitch. But she overcame that rule in the tweaker world and she did come forward.
>
> Why does somebody, who shoots and kills his supposed friend, stuff her in a refrigerator like a piece of meat. It was all a con.
>
> . . . .

> It is real simple, folks, he planned to kill her, he put the gun to her face, he pulled the trigger, he shot her, he killed her.

Given these circumstances, the error cannot be considered harmless, and there is a reasonable possibility that the error contributed to defendant's conviction.

We disagree with the prosecution's alternative argument that even if the evidence was not admissible as res gestae evidence, its admission was harmless because the evidence could still have been admitted under CRE 404(b). Evidence that is independent of the charged offense is governed by CRE 404(b), which provides:

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, *or absence of mistake or accident.*

(Emphasis added.)

Before admitting CRE 404(b) evidence, a trial court must make pertinent findings regarding the admissibility of the other bad act evidence. *People v. Garner*, 806 P.2d 366, 372 n.4 (Colo. 1991). First, the evidence must be admitted for a proper purpose, here the absence of an accident. *Id.* Then the evidence must meet the four-

part test articulated in *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990): (1) the evidence must relate to a material fact in the case; (2) it must be logically relevant to the material fact; (3) the logical relevance must be independent of the prohibited inference that the defendant acted in conformity with a bad character; and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v. Snyder*, 874 P.2d 1076, 1078 (Colo. 1994). Next, the trial court must be satisfied by a preponderance of the evidence that the prior crime, or here, the conversation, occurred. Finally, the trial court must advise the jury of the limited purpose for the admission and consideration of the evidence. *Garner*, 806 P.2d at 372 n.4; *Adrian v. People*, 770 P.2d 1243, 1244 (Colo. 1989).

Failure to conduct the *Spoto* and *Garner* analysis of CRE 404(b) evidence is not reversible error if the record supports the trial court's admission of the evidence. *People v. Martinez*, 36 P.3d 154, 158 (Colo. App. 2001). However, because the trial court did not comply with CRE 404(b)'s procedural safeguards, the record lacks the necessary fact findings for us to conclude that the evidence is admissible.

Accordingly, the case must be remanded for a new trial. We express no opinion as to whether on retrial the evidence as to the "plan" would be admissible under CRE 404(b).

Having so concluded, we need not address defendant's remaining assertions that the trial court abused its discretion by failing to explain why it denied the parties' plea agreement until after it was too late for the parties to renegotiate; that the trial court committed plain error by admitting into evidence highly prejudicial and irrelevant evidence of a shotgun; and that prosecutorial misconduct occurred.

The judgment is reversed, and the case is remanded for a new trial.

JUDGE FURMAN and JUDGE BERNARD concur.

1 THE COURT: Mr. Herringer, did you want
2 anything to say on the record here to --
3 MR. HERRINGER: No, I think the Court's
4 articulated our argument concerning that, so I don't have
5 anything additional.
6 THE COURT: Okay. I'm not going to allow that
7 in. It's just -- I don't even see you need to have any
8 evidence on that. So that won't come into evidence.
9 The next issue I wanted to deal with was the
10 allegation that a few weeks earlier, the defendant had
11 planned the murder of a woman. And I don't understand
12 why this is even a similar transaction under 404(b).
13 Isn't this the same transaction?
14 MR. HUGHES: Judge, what we have is an
15 allegation that the defendant shot the victim in the face
16 and claimed it was an accidental shooting. What the
17 witness would testify to is that within a short period of
18 time prior to this homicide, purported homicide, that the
19 witness was present when the defendant discussed a
20 planned -- the alleged killing of another woman.
21 THE COURT: Of another woman or this woman?
22 MR. HUGHES: Of a woman.
23 THE COURT: A woman.
24 MR. HUGHES: A woman. The People will concede
25 we do not have a name --

1 THE COURT: Okay.
2 MR. HUGHES: -- but it is the idea, at least
3 allegedly, is that it's the killing of a woman and the
4 disposing of her body in a location where she would not
5 be found.
6 THE COURT: Which is pretty much what happened
7 here.
8 MR. HUGHES: Yes.
9 THE COURT: From your perspective.
10 MR. HUGHES: Yes.
11 THE COURT: Okay. Are there any other women
12 that are missing?
13 MR. HUGHES: No.
14 THE COURT: Okay. Any other women that were
15 killed during this time frame?
16 MR. HUGHES: No.
17 THE COURT: Okay. So I don't think -- I think
18 it just comes in. I don't think we get a 404(b)
19 analysis. I think it's this transaction.
20 MR. HUGHES: Okay.
21 THE COURT: Mr. Herringer, do you have any
22 argument on that, or tell me why I'm wrong.
23 MR. HERRINGER: Judge, I do think that it has a
24 potential to be a similar transaction because we don't
25 know who the person is that is even alleged to have been

1 talked about.

2 Second of all, I think that there's substantial
3 controversy as to whether or not this even occurred. And
4 a number of the witnesses who are alleged to have been
5 present at that time say that they did not hear anything
6 of this sort and they did not remember any conversation.

7 In fact, Mr. Frank Edwards, who was in here
8 earlier, he said that he didn't hear anything. There was
9 an interview of a gentleman by the name of Randy Matthews
10 who was also alleged to have been present. He says he
11 didn't hear anything. Byron Fish, who's a corroborating
12 prosecution witness, was supposed to be present and he
13 says he didn't hear anything concerning this.

14 Judge, our position would be that this is
15 something that where there is substantial evidence to
16 call into doubt whether or not it ever even happened.
17 It's something that the witness apparently has come
18 forward with after the fact and approached law
19 enforcement after the allegations of homicide were made
20 against Mr. Greenlee, and we think that letting it in
21 without an evidentiary hearing in advance to determine
22 whether or not it's evidence that is reliable enough to
23 go before a jury is -- from our perspective, we think
24 that it would make -- be the prudent thing for the Court
25 to do to make some sort of preliminary ruling regarding

1 whether or not this evidence is sufficiently reliable
2 enough that it should go before a jury to begin with.
3 THE COURT: What procedure is that? I mean,
4 where's that in the rules of procedure?
5 MR. HERRINGER: Judge, I think it's the same as
6 a motion in limine. Is it unduly prejudicial under
7 404(3) and is the probative value of the evidence
8 substantially outweighed by its prejudicial effect. Does
9 it have relevance to this particular claimed incident.
10 From our perspective, if this goes before a
11 jury and it's allowed to go before a jury, we don't know
12 what a jury is going to do with it in terms of what kind
13 of weight or what kind of credibility they're going to
14 give it. And the same way you would under evidence
15 that's 404(b) evidence, I think that the Court has a duty
16 to make sure that the evidence at least passes a prime
17 fascia test of relevance to this incident and
18 relevance -- and that's not unduly prejudicial to
19 Mr. Greenlee.
20 So we would ask the Court to conduct basically
21 a brief hearing so we have an opportunity to question the
22 witness about her ability to observe, her -- what she
23 says she heard and make sure that we have an accurate
24 idea of what's going to be said before the prosecution
25 gets up and argues this in its opening statement, and

1 then it turns out that it turns out to be something
2 that's causally not related to the case at hand.
3 THE COURT: Well, number one, this isn't a
4 discovery proceeding. I mean, you don't get a
5 deposition, which is kind of what you're asking. It
6 sounds to me like you're argument is this is damaging to
7 your client and therefore, you want me to make a ruling
8 under whether or not the -- it's too prejudicial and that
9 outweighs its probative value. But if you've got one
10 witness saying one thing, three or four other witnesses
11 saying something else, isn't that a jury determination?
12 I don't see that being a legal determination.
13 MR. HERRINGER: I think in terms of the nature
14 of what we're talking about it's something that I think
15 the Court can make a pretrial ruling as to whether or not
16 this is -- this -- I think the prosecution would be
17 saying it's res gestae evidence and the Court would be
18 saying it's res gestae evidence as opposed to 404(b)
19 evidence. I still think the Court can make a preliminary
20 determination as to whether or not this res gestae
21 evidence should come before a jury. Whether or not it is
22 actually res gestae evidence or whether or not it is, at
23 least establish the point where it should go before a
24 jury.
25 THE COURT: Well, don't they have to prove

1 knowledge that he did this knowing what he was doing?
2 MR. HERRINGER: Yes.
3 THE COURT: So the fact that he may -- he was
4 planning this murder, and this is the only person that
5 was murdered, this was the only body that was disposed of
6 at least that they know of, I mean, it shows
7 premeditation which definitely shows knowledge. I mean,
8 I don't see where you get a hearing unless you can give
9 me a better reason than you have already.
10 MR. HERRINGER: Your Honor, if I could have
11 just a minute.
12 THE COURT: Yeah, yeah, think about it. And
13 I'm just throwing this at you.
14 MR. HERRINGER: The motion was advanced from
15 the perspective of it being a 404(b) issue.
16 THE COURT: I understand that.
17 MR. HERRINGER: The Court's basically now
18 saying that the Court doesn't view it as a 404(b) issue.
19 THE COURT: If you would like some time to
20 think about it and if you want to file a motion
21 in limine, I'll let you do that.
22 MR. HERRINGER: Okay. That's what I would ask
23 the Court to do. I mean, if the Court doesn't want to
24 hear evidence concerning this, the Court's inclined to
25 believe that it's not a 404(b) issue. I would prefer to

1 have the Court reserve final ruling regarding whether or
2 not there should be a pretrial hearing on this until I
3 have an opportunity to take a look at the grounds on
4 which the Court is saying that it believes it's
5 admissible.
6 THE COURT: That's fine, I don't have a problem
7 with that. That's fine.
8 Okay. That gets us down to our last issue
9 which is the admissibility of the videotape.
10 Mr. Herringer, do you plan on trying to
11 introduce this or introducing this?
12 MR. HERRINGER: Your Honor, I would say that
13 that's something I'm not prepared to say whether or not
14 we want to try to admit it until after the close of the
15 prosecution's case. I don't think the Court can make a
16 determination as to whether or not it's admissible until
17 the prosecution has framed its case and we have an
18 opportunity to determine whether or not it's issues,
19 relevant issues that they've raised during their case in
20 chief.
21 I don't see that it's immediately admissible.
22 I think there's some arguments in some ways that it might
23 become admissible. But really, I think that it is
24 certainly relevant to certain questions that might be
25 raised during the course of the trial. But is it