Certification of Word Count: Words 5706

SUPREME COURT, STATE OF COLORADO 2 E. 14th Ave., 4th Floor Denver, CO 80203	FILED IN THE SUPREME COURT OCT 10 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 05CA1480	
DEFENDANT/APPELLANT: FARRELL GREENLEE PLAINTIFF/APPELLEE: PEOPLE OF THE STATE OF COLORADO	▲COURT USE ONLY▲
Attorney Danyel S. Joffe Reg. No. 14144 Appointed by the Alternate Defense Counsel The Joffe Law Firm 1776 S. Jackson St., Ste. 602 Denver, CO 80210 303-757-6572 / Fax 303-759-3356 e-mail: djoffe@joffelawfirm.com	Case Number: 08SC10
ANSWER BRIEF	

TABLE OF CONTENTS

EXHIBIT B C.R.E. 103

EXHIBIT C PARTIAL TRANSCRIPT - RES GESTAE ISSUE

TABLE OF AUTHORITIES

Cases

Rules

The Appellant, Mr. Farrell Greenlee, by and through Counsel Danyel S. Joffe, as appointed by the Office of the Alternate Defense Counsel, and hereby submits his Answer Brief.

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 FACTS AND OF THE CASE

Relevant facts related to the case, as documented in the trial record, were not included in the State's Opening Brief. The relevant information directly applies to all the questions raised by this Court, and will be discussed in this brief.

This case started in the district court for Montezuma County. Mr. Greenlee was tried on two charges, Second Degree Murder of Ms. Allison Stewart and Tampering with Evidence. His defense was that it was an accident. Mr. Greenlee was convicted of both counts after a jury trial and sentenced concurrently to a 48 year sentence by the Montezuma County District Court in Case 04CR44.

There were several issues presented on direct appeal to the Court of Appeals.

The Court of Appeals addressed only one issue, the testimony of the witness Calinda Forristall. The Court of Appeals found that her testimony was improperly admitted over defense objections and, applying a harmless error standard of review, reversed Mr. Greenlee's conviction. (*People v. Greenlee*, 05CAl480 (Ct App 2007) The Court of Appeals also ordered the trial court to conduct a hearing on whether Ms. Forristall's testimony was admissible under C.R.E. 404(b) and then grant Mr. Greenlee a new trial. All three issues on Certiorari relate to the use of Ms. Forristall's testimony at trial. If this Court were to reverse the result reached by the Court of Appeals, this matter will need to be remanded to the Court of Appeals to address the remaining issues.

On December 12, 2003, Ms. Marcie Stewart was killed by a shot to her head from a shotgun. She was shot by Farrell Greenlee in a bedroom at Mr. Douglas Murdock's home in Montezuma County, Colorado. (V. XXII p. 823). Mr. Greenlee, the State, and the Sheriff all agreed that Mr. Greenlee was guilty of criminally negligent homicide and should be sentenced to 7 ½ years. Ms. Stewart's family did not object to the plea agreement. (V. XXIII p. 1179). The trial court rejected the plea without explanation. (V. XXIII p. 11).

The case went to trial. The crucial issue was Mr. Greenlee's mens rea. Was the shooting the result of a pure accident, the result of carelessness, or recklessness, or

was it done knowingly?

Two months after the case hit the newsstands, witness Ms. Forristall came forward with a story that seemed to implicate Mr. Greenlee as having acted intentionally or at least knowingly. Key State witness, Douglas Murdock, gave several versions of what occurred. The only witness who was present and who was consistent in her statements and testimony was Mari Wareham.

State witness, Mari Wareham, was the sole eyewitness, being the only other person in the room when Ms. Stewart was shot. Ms. Moreland consistently stated in pre-trial interviews and statements, and in her trial testimony that Mr. Greenlee shot Ms. Stewart accidentally. (V. XXII p. 854); (V. XV p. 3); (V. XXI pp. 780-784). The only other witness present immediately after the shooting was the State's witness, Douglas Murdock.

A pre-trial hearing was held on the admissibility of Ms. Calinda Forristall's claim that three months before the killing, she heard Mr. Greenlee plan a murder. (V. XIII). The State offered her testimony under C.R.E. 404(b). (V. XIII pp. 5-13). The Court chose to admit the evidence over defense objections that there should be a hearing on the credibility of the statement. (V. XIII pp. 10-12).

According to the witnesses who knew Mr. Greenlee, Mr. Greenlee always carried a shotgun with him. These witnesses only differed on the type of shotgun.

Mr. Greenlee was surprised to find Ms. Stewart at Mr. Murdock's home. Ms. Wareham and Mr. Greenlee went to Mr. Murdock's home to get some methamphetamine. At Mr. Murdock's home, Ms. Wareham noted that Mr. Greenlee and Ms. Stewart had a friendly, kidding, conversation. (V. XXII p. 820).

A superficial reading of the record can lead to confusion as to the events that occurred immediately before the shooting. However, by making a time line it is possible to reconstruct what occurred. Fundamentally, Mr. Greenlee was holding the gun in a horizontal position as he followed Mr. Murdock outside. He was still holding the gun in a horizontal position when Ms. Stewart asked to see the gun.

At one point, Mr. Murdock went outside. (V. XXI, p. 784) Mr. Greenlee followed carrying his shotgun. (V. XXI, p. 768). His gun was in a vertical position, but as he headed to the door, Mr. Greenlee kicked his gun into a horizontal position. (V. XXI, pp. 761-762).

It was only after Mr. Greenlee was heading outside, and still holding the gun in a horizontal position, that Ms. Stewart asked to see the gun. (V. XXI pp. 766 & 768-770). Ms. Stewart told Mr. Greenlee not to point it in her face. (V. XXI p. 768). Mr. Greenlee refused to let her see the gun, noting the gun was loaded. (V XXII p. 829). Mr. Greenlee then opened the gun, trying to make it safe. (V. XXII p. 829). Ms. Wareham had not seen him close the gun when she bent down to get

cigarettes. While bent down she heard a "click" and then the gun fired. (V. XXII p. 829), (V. XXI p. 780).

Although not in the record, Mr. Greenlee requests that this Court take judicial notice of the fact that properly operating shotguns should be unable to fire when open. Thus, the click referred to as the possible sound of Mr. Greenlee firing the gun could only have been Mr. Greenlee closing the gun. As Ms. Wareham heard the click and then heard the gun fire, the click sound cannot be evidence of a trigger being pulled, but could be evidence that the gun was defective and fired accidentally when Mr. Greenlee closed the gun.

The remaining facts relate to the question of probative value versus prejudicial impact. Thus, they will be discussed in Argument I

After the shooting, Mr. Greenlee went outside and told Mr. Murdock what occurred. Mr. Murdock came inside and the three of them discussed what to do next.[1] (V. XXI p. 781).

SUMMARY OF ARGUMENT

The Court of Appeals properly held that Ms. Forristall's story that Mr. Greenlee had described a plan to shoot a woman and then hide her body made two months before he shoots a woman and hides her body was inadmissible as res gestae evidence at his murder trial.

---

[1] The details of the conversation were in dispute at trial and will be discussed in more detail below.

The Court of Appeals properly applied the harmless error standard of review to the trial court's decision to admit Ms. Forristall's story that Mr. Greenlee had discussed a plan to murder Ms. Stewart two months before her death.

The erroneous decision to admit Ms. Forristall's story as res gestae rather than as 404(b) evidence was reversible error.

ARGUMENT

ARGUMENT I Probative value versus prejudicial impact.

There are several claims raised by the State at trial, on direct appeal, and on Certiorari that are not supported by the record. These claims directly relate to the question of probative value versus prejudicial impact. Mr. Greenlee believes that, in the context of his case, Ms. Forristall's story was so prejudicial that its use as res gestae evidence was far more prejudicial than probative, even under a plain error standard of review.

Assuming Ms. Forristall's story is true, were Mr. Greenlee's comments sufficiently related to the events to qualify as res gestae. Courts frown on treating statements as res gestae when the comment is made significantly before the event. Comments made before a crime are not res gestae unless the circumstances and comments are essential parts of the crime act, or are essential in creating one continuous transaction. Statements made significantly before the crime that do not

demonstrate the offense was planned are not res gestae. *State v. Burge*, 362 So. 2d 1371, 1377 (La. 1978).

In *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000) the Court held that res gestae evidence must be an act that is "inextricably intertwined" with the crime alleged. It must have a "causal, temporal, or spatial connection" with the crime charged.

This raises the question of whether Mr. Greenlee's statement sufficiently connected with Ms. Stewart's death to be treated as direct evidence that Mr. Greenlee planned to kill her. Res gestae evidence must likely make a material fact to "make the existence of any fact that is of consequence to the determination of the action more or less likely. *People v. Skufca*, 176 P.3d 83, 86-87 (Colo. 2008), referring to C.R.E. 401.

As will be discussed below, Ms. Forristall's story varied significantly from the actual events. In addition to not including a time frame, victim, or motive, the facts have only a superficial resemblance to the story. The story only provided one fact to the jury, that being that Mr. Greenlee was a bad person. The use of her story was necessary to the State's strategy of proving Mr. Greenlee's guilt by proving he was a bad person. The State cannot use claims that the defendant was a

bad person as the basis for the jury to convict the defendant. *People v. Rivera*, 56 P.3d 1155, 1166 (Colo. App. 2002).

Other evidence of the State's strategy exists. At trial, in pleadings before the Court of Appeals and in this Court, the State referred to Mr. Greenlee having used a sawed off shotgun. The record contradicts this claim. No witness testified Mr. Greenlee used a sawed off shotgun. State's witness, Ms. Wareham, said the shotgun Mr. Greenlee had the day of the shooting had a normal length barrel. (V. XXI p. 747, 750).

While referring to the fact that Mr. Greenlee used a sawed off shotgun, the State also claimed that the actual gun used was never found. The State used this fact to argue that Mr. Greenlee hid the gun in order to obstruct justice. (V XX, p. 424), (V XXII p. 1150). The State's comments constituted a judicial admission. *Larson v. A.T.S.I.* 859 P.2d 273, 275-276 (Colo. 1993).

Finally, the State introduced one paragraph of a two-page letter written by Mr. Greenlee from jail. Mr. Greenlee's comments in the letter are so vague, that interpreting them is an act of speculation.

During oral argument, the judges asked counsel what the State's theory of the case was. Upon review of the case for this brief, it is clear that the State's theory of the case was that Mr. Greenlee was a person of bad character. The State

improperly claimed that Mr. Greenlee used a sawed off shotgun, the way the State used Ms. Forristall's story, and the fact the State introduced Mr. Greenlee's brief mention of the book "A simple plan," served to prove that Mr. Greenlee was a bad person.

ARGUMENT II

Certiorari Issue I: Whether the Court of Appeals erred in holding that evidence of a defendant's plan to shoot a woman 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?

The Court of Appeals properly held that Ms. Forristall's story did not qualify as res gestae. Her story was only superficially related to what actually happened. In light of the fact the State's case was quite weak, Ms. Forristall's story served only to prove that Mr. Greenlee was a bad person.

Ms. Forristall claimed that, approximately 2-3 months before the shooting she heard Mr. Greenlee discussing what could only be labeled as a "perfect crime." A female victim was to be lured to Mr. Byron Fish's ranch and shot. There would be no witnesses and the body would be disposed of on Byron Fish's ranch to never to be found. (V. XXII, p. 1021). The best that can be said is that Ms. Forristall's story bore a minimally tangential relation to what actually occurred.

As will be explained below, her story did not relate to the facts as they most likely occurred, and that the only evidence jurors could gather from her story was

that Mr. Greenlee had a bad character. Evidence that only serves to prove that a defendant is a bad person and is guilty of the crime charge because he is acting consistently therewith is strictly prohibited. *Rivera*, at 1166; *Masters v. People*, 58 P.3d 979, 998-999 (Colo. 2002).

Ms. Forristall's story did not match the events, except tangentially. On the surface, the issue of hiding the body appears to tie Ms. Forristall's story to the crime charged. However, when each part of her story is compared to the what occurred, significant differences appear. Particularly the facts involving "hiding the body" are significantly different from the version told by Ms. Forristall.

The story involved killing a person in a way that nobody ever knew what happened. However, Ms. Wareham was a direct witness, and Mr. Greenlee then told Mr. Murdock. Mr. Greenlee would have had to kill both Ms. Wareham and Mr. Murdock to prevent anybody from knowing what occurred.

Ms. Stewart was lured nowhere. Instead, she was at Mr. Murdock's home, much to the surprise of Mr. Greenlee. Further, she was shot in Mr. Murdock's home with two witnesses present. Ms. Wareham was a direct witness and Mr. Murdock was a witness who heard Mr. Greenlee's confession. This clearly negates the part of the plan that required nobody know what happened.

Finally, the lynch pin of the alleged plan required nobody would ever know what happened to the victim. Had this been Mr. Greenlee's plan for Ms. Stewart, he could have hidden her in some canyon on his father's or Mr. Fish's ranch where the weather and scavengers would have destroyed all evidence of her remains. Mr. Greenlee did exactly the opposite. He incriminated himself by putting her remains in a scavenger proof container 500 yards from his father's house and then directing his father to the location.

Ms. Wareham gave undisputed sworn testimony that Mr. Greenlee was surprised to find Ms. Stewart at Mr. Murdock's home and thus their encounter was accidental. (V. XXII, p. 820). Ms. Wareham gave undisputed testimony that Mr. Greenlee had no reason to kill Ms. Stewart. (V. XXII p. 813). Even Mr. Murdock (V. XXII p. 1078) testified that he saw no indication Mr. Greenlee thought Ms. Stewart was a "snitch." (V. XXII pp. 819-820). Ms. Wareham noted that Mr. Greenlee's behavior towards Ms. Stewart would have been significantly different if he thought she was a "snitch." (V. XXII p. 849).

Of greater import, Mr. Murdock was the only person who could have had a motive for wanting Ms. Stewart dead because Ms. Stewart told authorities that Mr. Murdock was involved in making methamphetamine in his garage. (V. XXII, p.

850). Ms. Stewart did not "snitch" against Mr. Greenlee. He had no motive or reason for wanting her dead.

Two independent witnesses testified that Mr. Murdock did not want the body found. However, Ms. Wareham was consistent in stating that it was Mr. Greenlee who suggested calling authorities and Mr. Murdock who was violently opposed to calling the police. According to Ms. Wareham, 'Doug kept saying over and over "Nobody's leaving and nobody's calling the cops.'" (V. XXI pp. 786-787). Mr. Murdock said he was a felon and not suppose to have guns. (V. XXII p. 840). Mr. Murdock's behavior was consistent with somebody with a secret to hide, namely a methamphetamine lab in his garage. Mr. Fish, a witness for the State, confirmed Ms. Wareham's testimony. (V. XXII p. 840, 1072). Mr. Murdock told him it that he, Mr. Murdock, opposed calling the police. (V. XXII pp. 502).

Further, Ms. Stewart was placed in a refrigerator with the door facing the ground. Mr. Greenlee's actions preserved and protected her body from the environment and from predators. The coroner specifically noted that, for a person who had been dead three months, her body was in remarkably good condition. (V. XXII, p. 965)

When Mr. Gale Greenlee, the defendant's father, did not find the body, stored a mere 500 yards from his home, (V. XX, p. 512). Mr. Greenlee sent his father a

letter clearly intended to lead his father to the victim's remains and contact authorities. Mr. Greenlee intentionally implicated himself by his actions. He did keep his promise to Ms. Wareham that the victim's family would receive closure. (V. XXII, p. 848)

Further evidence Mr. Murdock lied about his claim that Mr. Greenlee was opposed calling authorities came out in his testimony about Mr. Greenlee picking up the body. Mr. Murdock testified he had no idea there was a methamphetamine lab in the garage. (V. XXII, p. 1094). Had Mr. Murdock been in the garage he would have known a methamphetamine lab was in the garage. Yet, Mr. Murdock testified he was in the garage the day of the shooting. Two days before the police found the lab in his garage, Mr. Murdock was in the garage. (V. XXII, p. 1053).

Mr. Murdock's behavior, as is clear from the evidence, was that of a person whose only concern was Mr. Murdock. Mr. Greenlee's behavior, even in the way he protected Ms. Stewart's body, was that of a person who cared about her, not somebody who wanted her dead.

However, when the above evidence is looked at in light of State's theory of the case, and in light of Ms. Forristall's story, Mr. Greenlee is clearly a bad person.

Res gestae evidence must be relevant. C.R.E. 401. It must help explain to the jury the background and conditions surrounding the charges against Mr. Greenlee.

People v. Skufca, 176 P.3d 83, 86-87 (Colo. 2008). It must be evidence of an prior crime, act, or comment clearly connected with the facts of the crime alleged and it must help explain what occurred. It must be so closely connected that it is a part of the transaction, and is necessary to ensure that the jury properly understands the main fact. *People v. Rollins*, 892 P.2d 866, 872-873 (Colo. 1995)

Res gestae can include prior threats if they meet the above criteria. *Sowards v. People*, 408 P.2d 441, 443 (Colo. 1965).

There are no Colorado cases that treat comments, such as those reported by Ms. Forristall, as res gestae. Ms. Forristall's story contained no specific threats, and neither named nor implied a victim. Ms. Forristall admitted there was no indication from anybody present that the alleged plan involved Ms. Stewart. (V. XXII p. 1021, 1028). Ms. Forristall's story did not include a time frame. Thus, Ms. Forristall's story did not meet the basic criteria for use of evidence as res gestae evidence. *Callis v. People*, 692 P.2d 1045, 1051 (Colo. 1984).

Admission of such evidence is error and grounds for reversal of a conviction. *Spoto v. People*, 795 P.2d 1314, 1318 (Colo. 1990). The prejudicial effect of the story was so great, and its relevance so minimal that it was inadmissible as res gestae evidence, much less C.R.E. 404(b) evidence.

The line of cases cited by the State support Mr. Greenlee's claim that Ms. Forristall's story did not qualify as res gestae. The State's cases can best be summarized by *People v. Fears*, 962 P.2d 272, 280 (Colo. App. 1997), a murder case. In *Fears*, the Court admitted res gestae evidence of a robbery that occurred months earlier. The robbery explained the murders because Mr. Fears killed witnesses to the robbery. *Fears*, at 275. The robbery of the restaurant was, in effect, the cause of the murders. It was so intertwined with the murders as to be an indistinguishable part of the murders. There is no legal, factual, or logical connection between the res gestae evidence in *Fears* and Ms. Forristall's story.

Ms. Forristall's story included no victim, no time frame, or other fact necessary to be admissible as res gestae. The story was not relevant pursuant to C.R.E. 401 but was highly prejudicial pursuant to C.R.E. 403. Ms. Forristall conceded that Mr. Greenlee made no mention of a specific victim, or of a motive or time frame. (V. XXII p. 1021, 1028). Her story was only useful to prove that Mr. Greenlee was a bad person.

The use of Ms. Forristall's story was highly prejudicial in its effect because the State significantly exacerbated the prejudice by claiming the story made it clear Mr. Greenlee had a longstanding plan to kill Ms. Stewart. (See State's Opening Statement (V. XX, p. 420) and Closing Argument, (V XXIII pp. 1147-48)

In light of the weak evidence of guilt for Second Degree Murder, it is quite likely that reasonable jurors would have reached a different verdict had Ms. Forristall's testimony been excluded, or limited under C.R.E. 404(b).

In conclusion, the Court of Appeals did not err in finding that the trial court improperly admitted Ms. Forristall's story as res gestae evidence.

Argument III
Certiorari Question 2: 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.

A. Application of the Harmless Error Standard.

The Court of Appeals properly chose to apply a harmless error standard of review to the trial court's decision to admit Ms. Forristall's story as res gestae evidence. The trial court's decision to admit Ms. Forristall's story as res gestae evidence was litigated during pretrial motions. (V. XIII). By raising objections to the admission of Ms. Forristall' story at the motions hearing, Mr. Greenlee preserved his objections to the admission of Ms. Forristall's story at the pre-trial motions hearing. This preserved Mr. Greenlee's objections for appellate purposes pursuant to C.R.E. 103(a)(2). (A copy of the statute is attached as Exhibit B) In *Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322, 1330 (Colo. 1986), this Court has expressed approval of resolving issues pre-trial. This Court noted that addressing issues pre-trial help "expedite trials." Thus, the Court of Appeals did not err in

applying a harmless error standard of review. *People v. Welsh*, 176 P.3d 781, 790 (Colo. App. 2007).

B. Prejudice versus probative value.

Res gestae is inadmissible when its probative value is significantly outweighed by the risk of unfair prejudice to the accused. C.R.E. 403; see *People v. Quintana*, 882 P.2d 1366 (Colo. 1994). Trial Courts are required to make specific findings that the unfair prejudice of evidence does not outweigh its probative value. C.R.E. 403; *People v. Agado*, 964 P.2d 565 (Colo. App. 1998) Usually, the proper standard of review is abuse of discretion. *People v. Auldridge*, 724 P.2d 87, 88-89 (Colo. App. 1986).

Although objections were not raised at trial, the defense strongly objected to the use of Ms. Forristall's story at a pre-trial motions hearing. (V. XIII) Parties are not required to use "talismanic language" to preserve an issue for appeal. However, objections need to be sufficient to appraise the trial court of the issue it needs to address. *State v. Melendez*, 102 P.3d 315, 322 (Colo. 2004).

The question of relevance versus prejudicial effect is crucial when deciding on the admission of evidence. They proposed demonstrating that the probative value was low using the testimony of other witnesses. Defense counsel offered the trial court an adequate opportunity to conduct a probative value, prejudicial effect

inquiry. *State v. Melendez*, 102 P.3d 315, 322 (Colo. 2004). However, the trial court expressly refused to conduct an *Agado* analysis. (V. XIII p. 12). The Court's refusal was in error. Thus, the proper standard of review was harmless error. *People v. Young*, 908 P.2d 1147, 1149 (Colo. App. 1995); see also *People v. Fuller*, 788 P.2d 741, 744 (Colo. 1990).

C. Reliability

To be admissible, res gestae evidence must be reliable. It is necessary to try to preclude the possibility the story was fabricated. *Patel v. State*, 603 S.E.2d 237, 241 (Ga. 2004). The defense objected to the reliability of Ms. Forristall's story due to the fact that she first contacted authorities more than two months after the story of Ms. Stewart's death hit the newsstands. Further, the defense noted several witnesses, alleged by Ms. Forristall to be present when the story was told, did not hear Mr. Greenlee tell any such story. (V. XIII, pp. 10-11).

D. Ms. Forristall's did not qualify as res gestae evidence.

The defense raised other objections. Counsel conceded that Ms. Forristall's story was similar and, potentially 404(b) evidence. However, it did not qualify as res gestae. The defense argued that Ms. Forristall's story was only similar in nature to the crime alleged. (V. XIII, p. 9). Finally, counsel challenged the

relevancy of Ms. Forristall's story. (V. XIII, p. 11). (A copy of the transcript relating to the introduction of Ms. Forristall's story is attached as Exhibit C).

As the defense made the proper objections at the motions hearing, they preserved their objections for appeal. Thus, Court of Appeals appropriately applied the harmless error standard to the erroneous us of Ms. Forristall's story as res gestae.

ARGUMENT IV

Certiorari Question 3: Whether the erroneous admission of Ms. Forristall's story as res gestae rather than as C.R.E. 404(b) evidence was reversible error.

The answer is clearly yes. The trial court's decision to admit Ms. Forristall's story as res gestae rather than under C.R.E. 404(b) significantly diminished counsel's ability to defend Mr. Greenlee in what was a very weak case. It certainly impacted defense strategy.

Ms. Forristall's testimony clearly impugned Mr. Greenlee's character. Had the evidence been admitted under 404(b), the defense would almost certainly have asked for a contemporaneous limiting instruction.

This Court has stated that C.R.E. 404(b) evidence is the "antithesis" of res gestae evidence. CRE 404(b) evidence is similar, but unrelated to the alleged crime. Res gestae evidence must be closely related in both time and nature to the charged offenses. *People v. Crespi*, 155 P.3d 570, 576 (Colo. App. 2006). Res

gestae evidence must be inextricably interwoven with the facts of the murder and directly relevant to the jury's understanding of why Mr. Greenlee and the victim were in the same house together, the events that led up to the shooting and Mr. Greenlee's behavior after the shooting. *People v. Young*, 987 P.2d 889, 894 (Colo. App. 1999).

Further, under C.R.E. 404(b) there must be a preponderance-of-the-evidence hearing to show that the defendant committed the prior bad act. The defense challenged whether Ms. Forristall ever heard Mr. Greenlee tell such a story. However, the Court refused to allow a hearing on the issue. (V. XIII, p. 10-11, 12). The defense would have been entitled to such a hearing had Ms. Forristall's story been subject to a C.R.E. 404(b) analysis.

Because Ms. Forristall's story was admitted as res gestae, it took on far greater significance then it would have under 404(b), with the duty to give a limiting instruction. However, it left a clear impression that Mr. Greenlee was a person of bad character. There is a reasonable possibility the jury convicted Mr. Greenlee based on character evidence.

There is no way to know what the outcome would have been had the evidence been excluded as not meeting the standards for admission of C.R.E. 404(b) evidence. There is no way to know how the trial court's ruling negatively

impacted defense strategy. There is no way to know how a change in defense strategy might have impacted the jury's decision. Finally, in light of the weakness of the State's case, there is a reasonable possibility that the outcome would have been different had Ms. Forristall's testimony been excluded, or had it been admitted under 404(b), with a limiting instruction.

Applying a harmless error standard of review, *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999) it is clear that the admission of Ms. Forristall's story as res gestae rather than 404(b) evidence is reversible error.

The result is the same even under a plain error standard of review. The lack of a C.R.E. 404(b) cautionary instruction seriously undermined the fundamental fairness of the trial. In light of the weakness of the State's case, the only real value of Ms. Forristall's story was that Mr. Greenlee was a bad person. Lacking a 404(b) limiting instruction, the jury had no idea Ms. Forristall's story could not be used as proof that Mr. Greenlee had a bad character.

The admission of Ms. Forristall's story as res gestae undermined the fundamental fairness of the trial and cast serious doubt on the reliability of Mr. Greenlee's conviction for second degree murder. *People v. Boykins*, 140 P.3d 87, 95 (Colo. App. 2005); *People v. Wilson*, 838 P.2d 284, 290 (Colo. 1992).

There is some case law that indicates counsel may request a 404(b) type limiting instruction on the admission of res gestae evidence. However, the trial court had already ruled that probative value versus prejudicial effect was a jury question. (V. XIII. p. 11). In light of the court's ruling, requesting a limiting instruction would have been pointless.

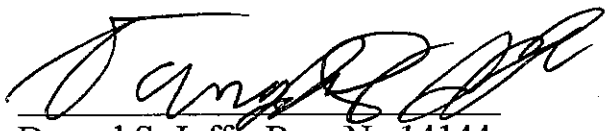
Thus, applying a plain error standard of review gives the same result, the admission of Ms. Forristall's story as res gestae rather than C.R.E. 404(b) evidence is reversible error.

CONCLUSION

Mr. Greenlee did not receive a fair trial. It is highly probable the results would have been different had the Judge refused to admit Ms. Forristall's story under any theory, much less chose to admit it as res gestae. Mr. Greenlee's matter should be remanded for a new trial in which the irrelevant evidence is excluded or for a hearing on whether Ms. Forristall's story qualified as 404(b) evidence, and for a new trial.

Done this 10th day of October 2008.

Respectfully submitted,
THE JOFFE LAW FIRM



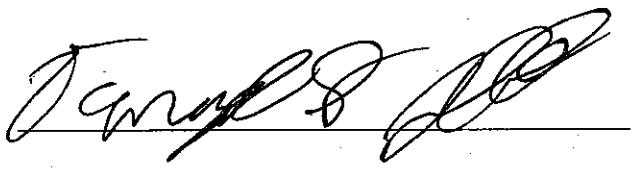
Danyel S. Joffe, Reg. No.14144

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ANSWER BRIEF was placed in the United States Mail, postage prepaid on this 10th day of October 2008, and addressed to all parties of record as follows:

Office of the Attorney General
1525 Sherman St., 5th Floor
Denver, CO 80203

Mr. Farrell Greenlee #126813
P.O. Box 6000
Sterling, CO 80751-0600



ANSWER BRIEF EXHIBIT A

People v. Greenlee Case Number: 08SC10

C.R.E. 404

Exhibit A C.R.E. 404.

Rule 404. Character Evidence Not Admissible to Prove Conduct.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness as provided in Rules 607, 608, and 13-90-101.

(b) Other crimes, wrongs, or acts. 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Federal Rule Identical.) HISTORY: Source: (a) amended and adopted June 20, 2002, effective July 1, 2002; (a)(1), (a)(2), and (b) amended and effective September 27, 2007.

ANSWER BRIEF EXHIBIT B

People v. Greenlee Case Number: 08SC10

C.R.E. 103

Exhibit B C.R.E. 103

C.R.E. Rule 103. Rulings on Evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, 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; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

ANSWER BRIEF EXHIBIT C

People v. Greenlee Case Number: 08SC10

Partial Transcript Motions Hearing Vol. XIII

DISTRICT COURT, MONTEZUMA COUNTY, COLORADO

Court Address: 109 West Main
Cortez, CO 81321
970-565-1111

Plaintiff: THE PEOPLE OF THE STATE OF COLORADO

Defendant: FARRELL GREENLEE

FILED IN DISTRICT COURT
MONTEZUMA COUNTY COLORADO
06 JAN 11 PM 1:14
SANDRA D. WEAVER
CLERK

COURT USE ONLY

Plaintiff's Attorney:
Mr. Andrew M. Hughes, #22334
Assistant District Attorney

Defendant's Attorneys:
Mr. William Herringer, #23220
Mr. David H. Greenberg, #14781

Case No. 04CR44

REPORTER'S TRANSCRIPT OF HEARING

Hearing in this matter was commenced on September 3, 2004, before the HONORABLE JEFFREY WILSON, District Judge, in Cortez, Colorado.

ORIGINAL

Are you Frank Edwards?

MR. EDWARDS: Yeah.

MR. HERRINGER: Judge, I'm going to call him as a witness, too.

MR. HUGHES: Yeah.

MR. HERRINGER: Okay. He needs to be excused, also.

Mr. Edwards, you need to be excused and not discuss your testimony until you're called later as a witness.

THE COURT: Okay. To my understanding, we have three issues here; one is the videotape, whether or not that comes in, the other is a motion regarding introduction of similar transactions for ordering -- the defendant ordering people out of a vehicle with a shotgun, and the other one being a motion for similar transactions concerning the defendant planning on killing someone.

Is that what we're looking at?

MR. HUGHES: I believe in my prior acts motion, No. N, I've delineated the shotgun thing and, yes, the plan to kill somebody, Judge, thank you.

THE COURT: All right. Well, let's start off with the putting the shotgun in people's faces, and I know you've just excused all your witnesses, but before

we even get to that point, I mean, I've looked at what the motion says and I need to know why this even comes in under *Spoto*. I mean, it's exactly the fact situation under *Spoto*, isn't it?

MR. HUGHES: Judge, I think that I have some other case law that I believe is also supportive; one being the *Douglass v. People*. And in that case, the defendant was charged with two counts of felony menacing and --

THE COURT: Well, I've read the *Douglass* case.

MR. HUGHES: Okay.

THE COURT: And the *Douglass* case is different because there, they're talking about self-defense as opposed to an accident. I think that's a huge difference here.

MR. HUGHES: Judge, I think that from the People's point of view, 404(b) specifically delineates an accident-type situation -- a nonaccident-type situation, and the issue, I think, in this case is the intent of the defendant.

And I believe that showing that he put the gun in this woman's face, I believe she would testify twice, and threatened to shoot her shows that there is a specific intent there to do such a thing and that it's not an accident.

Intent is one of the specific delineated exceptions under 404(b) and I believe that's the kind of situation that we have.

THE COURT: Okay. But under the *Spoto* case, the situation was -- the allegation was there was an accidental shooting, that a person had put a gun to someone else's -- can't remember if it was the neck or back or somewhere -- and defense was is that it was an accident.

And Judge Cannon allowed the prosecution to put on evidence that the defendant had earlier put a gun up to somebody's head, and the Supreme Court ruled that when you're looking at an accident -- I mean, you've got a lot of things under the four prong test in *Spoto* that would allow that information to come in, but you don't get it in because you're putting on evidence that this is a person who has a tendency to pull guns on people and the fact -- and you're using that bad character to show that he did it again on this occasion, and I don't see any difference between that situation and what you have here.

So do you have any other reason why this should come in?

MR. HUGHES: Again, Judge, I think it goes to the issue of intent. Thank you.

THE COURT: Mr. Herringer, did you want anything to say on the record here to --

MR. HERRINGER: No, I think the Court's articulated our argument concerning that, so I don't have anything additional.

THE COURT: Okay. I'm not going to allow that in. It's just -- I don't even see you need to have any evidence on that. So that won't come into evidence.

The next issue I wanted to deal with was the allegation that a few weeks earlier, the defendant had planned the murder of a woman. And I don't understand why this is even a similar transaction under 404(b). Isn't this the same transaction?

MR. HUGHES: Judge, what we have is an allegation that the defendant shot the victim in the face and claimed it was an accidental shooting. What the witness would testify to is that within a short period of time prior to this homicide, purported homicide, that the witness was present when the defendant discussed a planned -- the alleged killing of another woman.

THE COURT: Of another woman or this woman?

MR. HUGHES: Of a woman.

THE COURT: A woman.

MR. HUGHES: A woman. The People will concede we do not have a name --

talked about.

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

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

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

whether or not this evidence is sufficiently reliable enough that it should go before a jury to begin with.

THE COURT: What procedure is that? I mean, where's that in the rules of procedure?

MR. HERRINGER: Judge, I think it's the same as a motion in limine. Is it unduly prejudicial under 404(3) and is the probative value of the evidence substantially outweighed by its prejudicial effect. Does it have relevance to this particular claimed incident.

From our perspective, if this goes before a jury and it's allowed to go before a jury, we don't know what a jury is going to do with it in terms of what kind of weight or what kind of credibility they're going to give it. And the same way you would under evidence that's 404(b) evidence, I think that the Court has a duty to make sure that the evidence at least passes a prime fascia test of relevance to this incident and relevance -- and that's not unduly prejudicial to Mr. Greenlee.

So we would ask the Court to conduct basically a brief hearing so we have an opportunity to question the witness about her ability to observe, her -- what she says she heard and make sure that we have an accurate idea of what's going to be said before the prosecution gets up and argues this in its opening statement, and

then it turns out that it turns out to be something that's causally not related to the case at hand.

THE COURT: Well, number one, this isn't a discovery proceeding. I mean, you don't get a deposition, which is kind of what you're asking. It sounds to me like you're argument is this is damaging to your client and therefore, you want me to make a ruling under whether or not the -- it's too prejudicial and that outweighs its probative value. But if you've got one witness saying one thing, three or four other witnesses saying something else, isn't that a jury determination? I don't see that being a legal determination.

MR. HERRINGER: I think in terms of the nature of what we're talking about it's something that I think the Court can make a pretrial ruling as to whether or not this is -- this -- I think the prosecution would be saying it's res gestae evidence and the Court would be saying it's res gestae evidence as opposed to 404(b) evidence. I still think the Court can make a preliminary determination as to whether or not this res gestae evidence should come before a jury. Whether or not it is actually res gestae evidence or whether or not it is, at least establish the point where it should go before a jury.

THE COURT: Well, don't they have to prove

knowledge that he did this knowing what he was doing?

MR. HERRINGER: Yes.

THE COURT: So the fact that he may -- he was planning this murder, and this is the only person that was murdered, this was the only body that was disposed of at least that they know of, I mean, it shows premeditation which definitely shows knowledge. I mean, I don't see where you get a hearing unless you can give me a better reason than you have already.

MR. HERRINGER: Your Honor, if I could have just a minute.

THE COURT: Yeah, yeah, think about it. And I'm just throwing this at you.

MR. HERRINGER: The motion was advanced from the perspective of it being a 404(b) issue.

THE COURT: I understand that.

MR. HERRINGER: 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.

MR. HERRINGER: 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 or 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.

Okay. That gets us down to our last issue which is the admissibility of the videotape.

Mr. Herringer, do you plan on trying to introduce this or introducing this?

MR. HERRINGER: Your Honor, I would say that that's something I'm not prepared to say whether or not we want to try to admit it until after the close of the prosecution's case. I don't think the Court can make a determination as to whether or not it's admissible until the prosecution has framed its case and we have an opportunity to determine whether or not it's issues, relevant issues that they've raised during their case in chief.

I don't see that it's immediately admissible. I think there's some arguments in some ways that it might become admissible. But really, I think that it is certainly relevant to certain questions that might be raised during the course of the trial. But is it

ANSWER BRIEF EXHIBIT C

People v. Greenlee Case Number: 08SC10

Partial Transcript Motions Hearing Vol. XIII

DISTRICT COURT, MONTEZUMA COUNTY, COLORADO

Court Address: 109 West Main
Cortez, CO 81321
970-565-1111

Plaintiff: THE PEOPLE OF THE STATE OF COLORADO

Defendant: FARRELL GREENLEE

FILED IN DISTRICT COURT
MONTEZUMA COUNTY COLORADO
06 JAN 11 PM 1:14
SANDRA D. WEAVER
CLERK

COURT USE ONLY

Plaintiff's Attorney:
Mr. Andrew M. Hughes, #22334
Assistant District Attorney

Defendant's Attorneys:
Mr. William Herringer, #23220
Mr. David H. Greenberg, #14781

Case No. 04CR44

REPORTER'S TRANSCRIPT OF HEARING

FILED IN THE
COURT of APPEALS
STATE OF COLORADO
JAN 18 2006
Clerk, Court of Appeals

RECEIVED
JAN 17 2006
Clerk, Court of Appeals

Hearing in this matter was commenced on September 3, 2004, before the HONORABLE JEFFREY WILSON, District Judge, in Cortez, Colorado.

ORIGINAL

Are you Frank Edwards?

MR. EDWARDS: Yeah.

MR. HERRINGER: Judge, I'm going to call him as a witness, too.

MR. HUGHES: Yeah.

MR. HERRINGER: Okay. He needs to be excused, also.

Mr. Edwards, you need to be excused and not discuss your testimony until you're called later as a witness.

THE COURT: Okay. To my understanding, we have three issues here; one is the videotape, whether or not that comes in, the other is a motion regarding introduction of similar transactions for ordering -- the defendant ordering people out of a vehicle with a shotgun, and the other one being a motion for similar transactions concerning the defendant planning on killing someone.

Is that what we're looking at?

MR. HUGHES: I believe in my prior acts motion, No. N, I've delineated the shotgun thing and, yes, the plan to kill somebody, Judge, thank you.

THE COURT: All right. Well, let's start off with the putting the shotgun in people's faces, and I know you've just excused all your witnesses, but before

we even get to that point, I mean, I've looked at what the motion says and I need to know why this even comes in under *Spoto*. I mean, it's exactly the fact situation under *Spoto*, isn't it?

MR. HUGHES: Judge, I think that I have some other case law that I believe is also supportive; one being the *Douglass v. People*. And in that case, the defendant was charged with two counts of felony menacing and --

THE COURT: Well, I've read the *Douglass* case.

MR. HUGHES: Okay.

THE COURT: And the *Douglass* case is different because there, they're talking about self-defense as opposed to an accident. I think that's a huge difference here.

MR. HUGHES: Judge, I think that from the People's point of view, 404(b) specifically delineates an accident-type situation -- a nonaccident-type situation, and the issue, I think, in this case is the intent of the defendant.

And I believe that showing that he put the gun in this woman's face, I believe she would testify twice, and threatened to shoot her shows that there is a specific intent there to do such a thing and that it's not an accident.

Intent is one of the specific delineated exceptions under 404(b) and I believe that's the kind of situation that we have.

THE COURT: Okay. But under the *Spoto* case, the situation was -- the allegation was there was an accidental shooting, that a person had put a gun to someone else's -- can't remember if it was the neck or back or somewhere -- and defense was is that it was an accident.

And Judge Cannon allowed the prosecution to put on evidence that the defendant had earlier put a gun up to somebody's head, and the Supreme Court ruled that when you're looking at an accident -- I mean, you've got a lot of things under the four prong test in *Spoto* that would allow that information to come in, but you don't get it in because you're putting on evidence that this is a person who has a tendency to pull guns on people and the fact -- and you're using that bad character to show that he did it again on this occasion, and I don't see any difference between that situation and what you have here.

So do you have any other reason why this should come in?

MR. HUGHES: Again, Judge, I think it goes to the issue of intent. Thank you.

THE COURT: Mr. Herringer, did you want anything to say on the record here to --

MR. HERRINGER: No, I think the Court's articulated our argument concerning that, so I don't have anything additional.

THE COURT: Okay. I'm not going to allow that in. It's just -- I don't even see you need to have any evidence on that. So that won't come into evidence.

The next issue I wanted to deal with was the allegation that a few weeks earlier, the defendant had planned the murder of a woman. And I don't understand why this is even a similar transaction under 404(b). Isn't this the same transaction?

MR. HUGHES: Judge, what we have is an allegation that the defendant shot the victim in the face and claimed it was an accidental shooting. What the witness would testify to is that within a short period of time prior to this homicide, purported homicide, that the witness was present when the defendant discussed a planned -- the alleged killing of another woman.

THE COURT: Of another woman or this woman?

MR. HUGHES: Of a woman.

THE COURT: A woman.

MR. HUGHES: A woman. The People will concede we do not have a name --

talked about.

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

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

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

whether or not this evidence is sufficiently reliable enough that it should go before a jury to begin with.

THE COURT: What procedure is that? I mean, where's that in the rules of procedure?

MR. HERRINGER: Judge, I think it's the same as a motion in limine. Is it unduly prejudicial under 404(3) and is the probative value of the evidence substantially outweighed by its prejudicial effect. Does it have relevance to this particular claimed incident.

From our perspective, if this goes before a jury and it's allowed to go before a jury, we don't know what a jury is going to do with it in terms of what kind of weight or what kind of credibility they're going to give it. And the same way you would under evidence that's 404(b) evidence, I think that the Court has a duty to make sure that the evidence at least passes a prime fascia test of relevance to this incident and relevance -- and that's not unduly prejudicial to Mr. Greenlee.

So we would ask the Court to conduct basically a brief hearing so we have an opportunity to question the witness about her ability to observe, her -- what she says she heard and make sure that we have an accurate idea of what's going to be said before the prosecution gets up and argues this in its opening statement, and

then it turns out that it turns out to be something that's causally not related to the case at hand.

THE COURT: Well, number one, this isn't a discovery proceeding. I mean, you don't get a deposition, which is kind of what you're asking. It sounds to me like you're argument is this is damaging to your client and therefore, you want me to make a ruling under whether or not the -- it's too prejudicial and that outweighs its probative value. But if you've got one witness saying one thing, three or four other witnesses saying something else, isn't that a jury determination? I don't see that being a legal determination.

MR. HERRINGER: I think in terms of the nature of what we're talking about it's something that I think the Court can make a pretrial ruling as to whether or not this is -- this -- I think the prosecution would be saying it's res gestae evidence and the Court would be saying it's res gestae evidence as opposed to 404(b) evidence. I still think the Court can make a preliminary determination as to whether or not this res gestae evidence should come before a jury. Whether or not it is actually res gestae evidence or whether or not it is, at least establish the point where it should go before a jury.

THE COURT: Well, don't they have to prove

knowledge that he did this knowing what he was doing?

MR. HERRINGER: Yes.

THE COURT: So the fact that he may -- he was planning this murder, and this is the only person that was murdered, this was the only body that was disposed of at least that they know of, I mean, it shows premeditation which definitely shows knowledge. I mean, I don't see where you get a hearing unless you can give me a better reason than you have already.

MR. HERRINGER: Your Honor, if I could have just a minute.

THE COURT: Yeah, yeah, think about it. And I'm just throwing this at you.

MR. HERRINGER: The motion was advanced from the perspective of it being a 404(b) issue.

THE COURT: I understand that.

MR. HERRINGER: 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.

MR. HERRINGER: 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 or 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.

Okay. That gets us down to our last issue which is the admissibility of the videotape.

Mr. Herringer, do you plan on trying to introduce this or introducing this?

MR. HERRINGER: Your Honor, I would say that that's something I'm not prepared to say whether or not we want to try to admit it until after the close of the prosecution's case. I don't think the Court can make a determination as to whether or not it's admissible until the prosecution has framed its case and we have an opportunity to determine whether or not it's issues, relevant issues that they've raised during their case in chief.

I don't see that it's immediately admissible. I think there's some arguments in some ways that it might become admissible. But really, I think that it is certainly relevant to certain questions that might be raised during the course of the trial. But is it