

Certification of Word Count: 1,587

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>FILED IN THE SUPREME COURT NOV 10 2008</p>
<p>On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 05CA1480</p>	<p>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p>
<p>THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. FARRELL GREENLEE, Respondent.</p>	<p>▲ COURT USE ONLY ▲ Case No.: 08SC10</p>
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<p>PEOPLE'S REPLY BRIEF</p>	

This Court has described the concept of res gestae broadly in terms of evidence that is relevant to and explanatory of evidence of the defendant's crime:

- Evidence of other offenses or acts that is not extrinsic to the offense charged, but rather, is part of the criminal episode or transaction with which the defendant is charged, is admissible to provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred even though such evidence may indicate the commission of other misconduct or prior criminality. People v. Quintana, 882 P.2d 1366, 1373 (Colo. 1994).
- Such evidence is generally “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.” Id. (quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).
- Res gestae evidence includes the circumstances, facts and declarations which arise from the main event and serve to illustrate its character. Id.
- It also includes evidence that is closely related in both time and nature to the charged offense. Id.
- “Res gestae evidence is the antithesis of CRE 404(b) evidence. Where CRE 404(b) evidence is independent from the charged offense, res gestae evidence is linked to the offense.” Id. at 1373 n.12.

- “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. They are the events themselves speaking through the instinctive words and acts of the participants; the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character.” People v. Woertman, 804 P.2d 188, 190 n.3 (Colo. 1991), quoting Martinez v. People, 132 P. 64, 65 (Colo. 1913).
- “Criminal occurrences do not always take place on a sterile stage; and where, as here, the events leading up to the crime are a part of the scenario which explain the setting in which it occurred, no error is committed by permitting the jury to view the criminal episode in the context in which it happened.” People v. Czemerynski, 786 P.2d 1100, 1109 (Colo. 1990), quoting People v. Lobato, 530 P.2d 493, 496 (Colo. 1975).
- Evidence of other acts, including criminal conduct, that occurs contemporaneously with, or is part and parcel of the crime charged, is considered part of the *res gestae* of the offense and consequently is not subject to the general rule that excludes evidence of prior criminality. Id.

As such, *res gestae* is not a separate category or rule of admissibility but rather a theory of relevance. The concept of *res gestae* recognizes that certain evidence—categorized as *res gestae* evidence—is relevant because it leads up to and explains the charged crime.

This concept is similar to the recognized principle that certain categories of evidence are relevant, not because they are discussed in a separate rule of evidence, but because they tend to demonstrate a unique theory of relevance. For example, there is no separate rule for the admission of evidence showing the defendant's "consciousness of guilt," yet it is a recognized category of evidence that is generally considered relevant. See People v. Summitt, 132 P.3d 320, 324 (Colo. 2006) (evidence of flight and concealment to avoid arrest can be admissible to show consciousness of guilt); People v. Lowe, 660 P.2d 1261, 1264-65 (Colo. 1983) (threats against nonwitness relevant to show consciousness of guilt), overruled on other grounds by Callis v. People, 692 P.2d 1045, 1050 n.7 (Colo. 1984).

Here, the evidence of Greenlee's prior plan to murder a woman and hide her body demonstrated either that: (1) he had developed a plan to kill Ms. Stewart prior to doing so; and/or (2) he was fascinated by the idea of committing a perfect murder and killed Ms. Stewart in order to do that.

This evidence tied directly into the statements Greenlee made in his letter about the book "A Simple Plan," particularly his statements that: "I love it when a plan comes together, which is, of course, how I got into this mess"; and "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).

Ms. Forristall's testimony concerning Greenlee's discussion of a plan to commit a murder tied in directly with these statements and refuted Greenlee's claim that he had shot Ms. Stewart accidentally. The evidence thus was relevant because it was circumstantially probative of the defendant's culpable mental state, and showed the "total picture" or the "context" surrounding the homicide. See Quintana, 882 P.2d at 1373 (proper to provide jury with "context" or "story" of the crime); Czemerynski, 786 P.2d at 1109 (proper to admit evidence of "events leading up to the crime" so jury understands "context" in which crime occurred); Wilkinson v. People, 460 P.2d 774, 777 (Colo. 1969) ("total picture surrounding the homicide"); People v. Cooper, 950 P.2d 620, 623 (Colo. App. 1997), rev'd on other grounds, Cooper v. People, 973 P.2d 1234 (Colo. 1999) (prior acts provide necessary background for the charged offense). Because such evidence is held to constitute an "integral" part of the charged crime, it is therefore "not subject to the general rule that excludes evidence of prior criminality." Quintana, 882 P.2d at 1373; Czemerynski, 786 P.2d at 1109.

Nonetheless, Greenlee argues that the evidence was irrelevant because it was too remote and did not occur contemporaneously with the charged offense.

However, the remoteness of prior incidents relates only to the weight to be given the evidence, not to its admissibility. People v. Gordon, 765 P.2d 633, 635 (Colo. App. 1988); see also People v. Geller, 540 P.2d 334, 337 (Colo. 1975) (discussing remoteness in context of CRE 404(b); “There is no fixed standard for determining remoteness. It is therefore necessary to consider all the circumstances of the case, the nature of the acts indicated or shown by the evidence offered, and the nature of the crime. In any case, the determination of whether evidence is too remote to be relevant is left to the discretion of the trial judge, and his decision will not be reversed in the absence of clear proof of an abuse of that discretion.”).

Although *res gestae* evidence often derives from actions close in time to the charged conduct, there is no requirement that *res gestae* evidence must occur contemporaneously with the crime in order to be “part and parcel” of it. To the extent that Greenlee asserts otherwise, he is simply wrong. In People v. Fears, 962 P.2d 272 (Colo. App. 1997), for example, a division of the court of appeals approved the admission of evidence of a robbery committed in September 1988 as part of the *res gestae* of two murders committed in June 1989. Fears, 962 P.2d at 275, 280. As the court acknowledged in Fears, the prior acts in that case were necessary to provide “a contextual understanding of why [the victim] was a target,” without which “the jury would be left with the false impression that the killings in

this case were simply random acts of violence.” Id. at 280. In fact, this Court’s res gestae opinions have approved of evidence remote in time, demonstrating this Court’s acknowledgment that evidence need not be close in time to be admissible as res gestae.

Greenlee also argues that the trial court’s admission of the evidence violated CRE 403. Under CRE 403, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice” People v. Garner, 806 P.2d 366, 373 (Colo. 1991) (emphasis added). In making this determination, courts are to assume the maximum probative value that a reasonable fact finder might give to the evidence and the minimum unfair prejudice to be reasonably expected from it. People v. Lowe, 660 P.2d 1261, 1264 (Colo. 1984).

Reversal is unwarranted unless there is a probability that the potential for unfair prejudice substantially outweighed the evidence’s probative effect. People v. Freeman, 668 P.2d 1371, 1382 (Colo. 1983). “[U]nfair prejudice within the meaning of the rule still refers only to ‘an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis’ and does not mean prejudice that results from the legitimate probative force of the evidence.” People v. Rath, 44 P.3d 1033, 1043 (Colo. 2002).

“Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion,” the application of the unfair prejudice rule to exclude evidence “must be cautious and sparing.” People v. Robinson, 908 P.2d 1152, 1156 (Colo. App. 1995), aff’d on other grounds, 927 P.2d 381 (Colo. 1996).

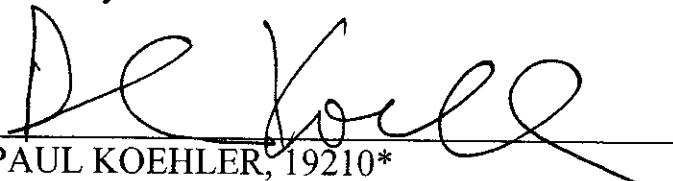
Here, there was no potential for unfair prejudice because Ms. Forristall’s evidence did not concern an improper ground for conviction. Instead, the evidence showed—alone and in combination with his own letter—that Greenlee had planned to commit a murder prior to killing Ms. Stewart.

The trial court thus did not abuse its discretion in admitting Ms. Forristall’s testimony, under either the plain or harmless error standards.

CONCLUSION

For these reasons, this Court should reverse the court of appeals’ opinion and remand the case to that court for further proceedings.

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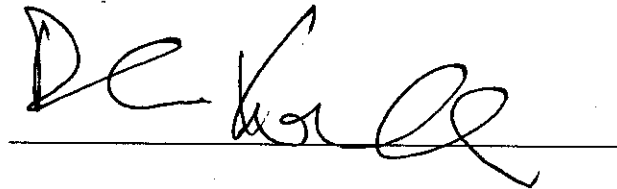
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PEOPLE'S REPLY BRIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 10th day of November, 2008, addressed as follows:

Danyel Joffe
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A handwritten signature in black ink, appearing to read "D. Joffe", is written over a horizontal line.

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